

LAW AND CONTEMPORARY PROBLEMS

SEX OFFENSES

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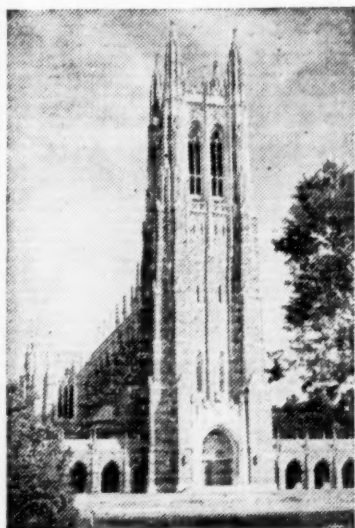
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FOREWORD

The gestation of this symposium has been a long and rather curious one. The seed was first planted about five years ago, when a correspondent wrote:¹

I've been on grand jury duty for the past month. . . .

After Manhattan's monthly quota of felonious rapes, sodomies, and extortions of homosexuals I am even less certain than before that the public (as represented by juries) can be trusted with sexual "crimes." If my co-jurors are any indication, there is always a bloc that votes what I can only call the anti-sex ticket and demands that society be revenged for conduct that can be called criminal only in its degree of repugnance. Yet if the word "filthy" has any meaning whatever I would certainly apply it to the grilling of little girls, in the precision the "law" demands, before an amphitheater of strange men (our one woman fled). If the original experience was not traumatic enough, this can surely be guaranteed to scar them. Thus is justice served. I hope you will some day devote a volume to this unhappy topic.

This suggestion struck an immediately responsive chord. The proposed theme seemed to be significant and timely,² and one quite amenable to the cross-disciplinary sort of treatment that this journal frequently employs. Nevertheless, since the appearance of an issue devoted to a somewhat cognate subject was imminent,³ it was thought wise to postpone the planning and publication of a symposium on sex offenses until a more propitious time.

In the intervening years, as various symposia touching directly or indirectly on this theme appeared,⁴ the dedication of an issue to sex offenses was repeatedly deferred. Recently, however, owing primarily to the interest generated by the latest American Law Institute proposals,⁵ it was concluded that the season was ripe for the full-scale, integrated discussion that had earlier been envisaged. How sound this decision was and how successfully it has been implemented here the reader himself may judge.

¹ Letter from Eric Larrabee to the Editor, July 8, 1955.

² The first Model Penal Code formulations concerning sex offenses had just been promulgated, after much thought and discussion, by the American Law Institute. MODEL PENAL CODE art. 207 (Tent. Draft No. 4, 1955).

³ *Obscenity and the Arts*, 20 LAW & CONTEMP. PROB. 531-688 (1955).

⁴ See, e.g., *Narcotics*, 22 *id.* at 1-154 (1957); *Sentencing*, 23 *id.* at 399-582 (1958); *Crime and Correction*, 23 *id.* at 583-783 (1958).

⁵ MODEL PENAL CODE art. 207 (Tent. Draft No. 9, 1959).

This symposium has hopefully been designed critically and comprehensively to examine the social control of unconventional sex practices. To this end, our contributors have sought to survey and analyze the crazy quilt of laws governing sex offenses in this country, with an eye both to delineating the course of their historical development and to assaying their essential validity from an anthropological, an ethical, a sociological, a psychiatric, and a biological point of view. Since legislative and judicial as well as popular attitudes in this area seem to reflect a profound anxiety concerning children and adolescents, who are regarded as especially susceptible to sexual victimization, this facet of the subject has been intensively elaborated.

The theories spun out and the techniques devised by any one society for coping with a particular problem may or may not be readily translatable to another society, either in whole or in part. This in itself, however, is not the sole measure of their utility. Comparative study of the different approaches that have been taken to it has long been recognized as a most effective means of opening new perspectives on a problem and affording valuable insights and guides to its solution. With this in mind, two of our contributors have specifically addressed themselves to a description and appraisal of British and Scandinavian experience in this area. In light of our close cultural and ideological ties to these countries, these inquiries would seem to have even greater than usual relevance and merit.

The over-all thrust of this symposium parallels and largely reinforces that of the American Law Institute's Model Penal Code. Accordingly, no dramatic new departures should be expected. The justification of this issue lies rather in the hope that by more widely disseminating, explaining, and popularizing the notions that underlie currently debated reforms, it will hasten their general acceptance and thus conduce a sounder, more rational, and more humane resolution of this most troubling social problem. If it succeeds in this endeavor, even in small measure, this symposium will have amply served its purpose.

MELVIN G. SHIMM.

SEX OFFENSES: THE AMERICAN LEGAL CONTEXT

MORRIS PLOSCOWE*

A rational code of sex offense laws is long overdue in this country. Sex offense legislation presently on the books is largely unenforceable and much of this legislation does a great deal more harm than good. There are a number of fundamental reasons for this. In the first place, the prohibitions imposed by these laws are far too inclusive, covering far too many areas of sexual behavior. These laws make potential criminals of most of the adolescent and adult population, in that they proscribe every conceivable sexual act except a normal act of coitus between a man and a woman who are married to each other or an act of solitary masturbation. They, of course, prohibit not only the more innocuous kinds of sexual behavior engaged in by normal adults and adolescents, but also aberrant sexual behavior that may be dangerous. Thus, not only heavy necking, mutual masturbation, fornication, and adultery, but also forcible rape, forcible sodomy, incest, and the sexual abuse of small children are interdicted by these laws.

One goal of sex offense laws is to keep individuals chaste before marriage. Until then, individuals must not give overt expression to any sexual desires, except possibly through solitary masturbation; sex drives must be kept in check, under pain of incarceration.

After marriage, too, the law attempts to confine sexual activity. Thus, a married individual may not look for sexual liaison with other than his or her spouse, however embittered or distasteful their relations may have become. And should his or her spouse be in jail, in the country or overseas, or living separate and apart, a married individual must figuratively fasten on a chastity belt. Adultery may open the door to the penitentiary.

Nor is adultery the only invitation to sanctions for married individuals. Since time immemorial, men and women have engaged in what are politely called aberrant sex practices; nor are many of them—for example, oral-genital contacts—the exclusive usages of homosexuals and lesbians, but commonly may be indulged in a normal marital relationship. Indeed, most modern marriage manuals no longer view such practices with alarm as perversions, but rather consider them to be permissible preludes to normal coitus. The law, however, usually takes a different view and subjects participants in such acts to a possible felony conviction.

When American sex offense legislation is compared with the analogous law of Tudor England, one cannot but conclude that the modern American is considerably

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more naive than were his English ancestors. Only a small part of the sexual behavior legally proscribed here today was prohibited by the criminal law of Tudor England. Forcible rape, sexual intercourse with a female under ten, the sexual corruption of children, lewd and indecent acts in public, bestiality, buggery, the maintenance of houses of prostitution, too, might be punishable under the old English criminal law; but large areas of sexual behavior—for example, fornication, adultery, incest, fellatio, cunnilingus, mutual masturbation—were beyond the reach of the law and were punishable only as sins or ecclesiastical offenses by the Church of England. Since the ecclesiastical courts were not received in this country, our laws, therefore, initially provided no institutionalized means for dealing with sexual behavior that had been ignored by the common law. But the lacunae did not long remain, for legislators, prodded by moralistic constituents, rushed to fill these gaps. And, as we have seen, they have succeeded only too well.

It was apparent to most serious observers long before the Kinsey studies¹ that our sex offense laws were honored more in the breach than in the observance. Few branches of the law have shown such a wide divergence between actual human behavior and stated legal norms. Nor should this be surprising. Sexuality simply cannot realistically be confined within present legal bounds. It does not mysteriously blossom when a man and a woman are united in holy matrimony; nor, despite legal prohibitions, is it thereafter restricted to conventional acts of coition between marital partners.

The wide-ranging character of the prohibitions of sex offense laws and the almost universal disregard that they are accorded elicited the following biting comment and criticism from Dr. Kinsey:²

All of these and still other types of sexual behavior are illicit activities, each performance of which is punishable as a crime under the law. The persons involved in these activities, taken as a whole, constitute more than 95 per cent of the total male population. Only a relatively small proportion of the males who are sent to penal institutions for sex offenses *have been involved in behavior which is materially different from the behavior of most of the males in the population.* But it is the *total 95 per cent* of the male population for which the judge or board of public safety, or church, or civic group demands *apprehension, arrest, and conviction*, when they call for a clean-up of the sex offenders in a community. It is, in fine, a *proposal that 5 per cent of the population should support the other 95 per cent in penal institutions.*

The writer has pointed out elsewhere³ that this conclusion that ninety-five per cent of the male population could be jailed because of violations of sex offense laws is an exaggeration. It presupposes that such legislation is uniform throughout the country, that all sexual activity except solitary masturbation and normal marital

¹ ALFRED C. KINSEY, WARDELL POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

² ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 392 (1948). (Emphasis added.)

³ MORRIS PLOSCOWE, *SEX AND THE LAW* 137 (1951).

intercourse is universally prohibited, and that these laws invariably prescribe jail and prison sentences for their violation. This, however, is not so. One of the most remarkable features of American sex offense laws is their wide disparity in types of sexual behavior prohibited and their extraordinary variation in penalties imposed for similar offenses.

Fornication, a common form of premarital sexual activity, is prohibited by a majority of state laws; but it is deemed only a meretricious transaction in many states⁴ and is there beyond the reach of police, prosecuting attorneys, and jailers.⁵ Where fornication is prohibited, penalties provided by law vary from a ten-dollar fine in Rhode Island⁶ to a three-year prison sentence in Arizona.⁷

Adultery is more widely prohibited than fornication, although the prohibition is by no means universal.⁸ But among the states that do prohibit it, the same kinds of sexual misbehavior are not necessarily encompassed. In some states, a single act of coitus between a married individual and one who is not his or her spouse constitutes culpable adultery;⁹ in others, however, the adultery must be "open and notorious" or "habitual" before the criminal statute is deemed violated.¹⁰ In some states, an unmarried party to such a connection is deemed to be guilty of adultery;¹¹ in others, however, he or she would seem to be guilty of no more than fornication.

Generally, penalties for adultery are more severe than those for fornication, but they also vary considerably. Some states impose no penalties of imprisonment for adultery and make this offense punishable only by a fine;¹² in others, however, penalties of up to five years of imprisonment may be meted out for this offense.¹³

The crime of rape also differs greatly among the several states. In all states, it embraces much more than the forcible violation of the sexual integrity of a female, including as well conduct to which the female may have consented. In this latter

⁴ See, e.g., *Rachel v. State*, 71 Okla. Cr. 33, 107 P.2d 813 (1940).

⁵ In at least 10 states—Louisiana, Michigan, Missouri, New Mexico, New York, Oklahoma, South Dakota, Tennessee, Vermont, and Washington—fornication is not statutorily proscribed.

⁶ R. I. GEN. LAWS ANN. § 11-6-3 (1956).

⁷ ARIZ. REV. STAT. ANN. § 13-222 (1956). For a summary survey of the penalties imposed by the fornication statutes of the several states, see ROBERT VEIT SHERWIN, *SEX AND THE STATUTORY LAW* pt. 1, chart 5, at 83 (1949).

⁸ In at least five states—Arkansas, Louisiana, Nevada, New Mexico, and Tennessee—adultery is not statutorily proscribed.

⁹ See, e.g., *People v. Reed*, 246 App. Div. 895 (N.Y. 4th Dep't 1936).

¹⁰ See, e.g., *Warner v. State*, 202 Ind. 479, 483, 175 N.E. 661, 663 (1933): "... it is well settled that our present statute does not prohibit . . . acts 'of adulterous intercourse . . . of an occasional character, unaccompanied by any pretense of the parties living together.' . . . The design of this law is not to affix a penalty for the violation of the Seventh Commandment, but to punish those who, without lawful marriage, live together in the manner of husband and wife." Cf. *State v. Chandler*, 132 Mo. 155, 33 S.W. 797 (1896).

¹¹ E.g., N.Y. PEN. LAW § 100.

¹² These fines range from a minimum of \$10 in Maryland, MD. ANN. CODE art. 27, § 4 (1957); to a possible maximum of \$2,000 in Michigan. MICH. COMP. LAWS §§ 750.30, 750.503 (1948).

¹³ E.g., CONN. GEN. STAT. REV. § 53-218 (1958); ME. REV. STAT. ANN. ch. 134, § 1 (1954); OKLA. STAT. tit. 21, § 872 (1951); S.D. CODE § 3892 (1939); VT. STAT. tit. 13, ch. 5, § 201 (1958). For a summary survey of the penalties imposed by the adultery statutes of the several states, see SHERWIN, *op. cit. supra* note 7, pt. 1, chart 7, at 85.

connection, it should be noted that the age over which a female is regarded capable of consenting to coitus varies widely. The common-law age of consent of ten years has been discarded by modern statutes. An age limit of sixteen or eighteen years is now most common, although some states place it as low as twelve years,¹⁴ and another, going to the other extreme, places it at twenty-one years.¹⁵

Other differences in the definition of rape and in the scope of its statutory prohibition may also be noted. In some states, the lack of chastity of an underage female may be a defense to the charge of rape;¹⁶ in others, however, a conviction may still be had even if she was operating as a prostitute.¹⁷ Some states, also, make allowance for the age of the male,¹⁸ but most statutes are silent on this point. Moreover, in addition to such wide substantive differences as these among the several states as to what constitutes rape, there is also considerable disparity as to penalties. Death or life imprisonment may await a rapist in some states; other states, however, taking a more charitable view of his dereliction, may impose varying terms of imprisonment.¹⁹

Modern crime-against-nature and sodomy statutes and those interdicting lewd and lascivious behavior include most deviate sexual activity within the scope of their prohibitions. Nevertheless, there are differences here, too, among the several states, especially in the treatment of mutual male masturbation. This conduct is prohibited in many states, whether it occurs publicly or privately; in some, however, it is prohibited only if it occurs in a public place.²⁰ Penalties under sodomy and crime-against-nature statutes vary enormously as well. Thus, a consensual homosexual act between adults is only a misdemeanor in New York;²¹ but it may be punishable by life imprisonment in some states,²² a five-year minimum imprisonment in others,²³ and a five-year maximum imprisonment in still others.²⁴

Even the age-old offense of prostitution shows considerable variation in treatment. Most statutes define prostitution as the indiscriminate offer by a female of her body for sexual intercourse or other lewdness, for the purpose of gain or hire; but in many states, indiscriminate and promiscuous sexual intercourse, even *without gain*

¹⁴ E.g., ALA. CODE tit. 14, § 398 (1940); LA. REV. STAT. § 14:41 (1950).

¹⁵ E.g., TENN. CODE ANN. § 39-3706 (1955).

¹⁶ E.g., N.C. GEN. STAT. § 14-26 (1953); TENN. CODE ANN. § 39-3706 (1955); W. VA. CODE ch. 61, art. 2, § 15 (1931).

¹⁷ See, e.g., *State v. Snow*, 252 S.W. 629 (Mo. Sup. Ct. 1923).

¹⁸ E.g., N.Y. PEN. LAW § 2010; S.C. CODE § 1111 (1952).

¹⁹ For a summary survey of the penalties imposed by the rape statutes of the several states, see SHERWIN, *op. cit. supra* note 7, pt. 1, chart 5, at 85.

²⁰ E.g., N.Y. PEN. LAW § 722(8).

²¹ *Id.* § 690.

²² E.g., NEV. REV. STAT. § 201.190 (1958); MICH. COMP. LAWS § 750.158 (1948).

²³ E.g., ARIZ. REV. STAT. ANN. § 13-651 (1956); IDAHO CODE ANN. § 18-6605 (1948); MONT. CODES REV. ANN. § 94-4118 (1947); N.C. GEN. STAT. § 14-177 (1943); TENN. CODE ANN. § 39-707 (1956).

²⁴ E.g., KY. REV. STAT. § 436.050 (1955); LA. REV. STAT. § 14:89 (1950); N.H. REV. STAT. ANN. § 579:9 (1955); WIS. STAT. § 944.17 (1957). For a summary survey of the penalties imposed by the sodomy statutes of the several states, see SHERWIN, *op. cit. supra* note 7, pt. 1, chart 4, at 82.

or hire, may be prostitution.²⁵ Many states, moreover, make it possible to punish the customers of prostitutes, as well, either directly by specific statutory provisions²⁶ or indirectly by an extension of aiding-and-abetting statutes;²⁷ but other states refuse to punish customers, even though there can be no prostitution without them. While prostitutes are generally punishable by imprisonment of less than one year, there are notable exceptions, with maximum sentences running from thirty days²⁸ to five years.²⁹

The fact that sex offender laws vary so widely among the several states and value judgments as to the danger of similar offenses differ so greatly (as reflected in the range of penalties imposed) is a compelling reason for framing a rational uniform code in this area. We are not a congeries of individual states, each isolated within a water-tight compartment. Modern means of transportation and communication have made state boundaries largely meaningless. American men and women are continually upon the move. They should not be exposed to the risk of being branded felons in one state for sexual behavior that may be legally innocuous in another. They should not be subjected to the possibility of long prison sentences or even death in some states for behavior that may be punishable by only fines or short jail sentences in others, or not even punishable at all. The time has come when the lawyers should attempt to bring some order out of the chaotic profusion and variety of sex offender laws that now obtains.

The revision of sex offender laws, however, will require much more than the mere elimination of disparities and differences among the several states; it must also consider the fact that many of the existing prohibitions, no matter how widespread, are inherently unenforceable and should be abandoned. Police and prosecuting officials may successfully investigate and prosecute criminal cases where a victim makes a complaint or where the criminal activity is more or less overt in character. But sexual activity is largely private. There is no victim to make a complaint in the ordinary case of fornication, adultery, or deviant heterosexual or homosexual activity. Despite criminal sanctions, therefore, sexual misbehavior of this sort, when carried on privately and discreetly, is practically never punished. It is only the rare unfortunate offender who comes to the attention of the authorities; and although he is no more guilty than the hundreds of thousands of others who have freely indulged in similar kinds of sexual activity, he is pilloried because he was caught. Should police and prosecuting officials be burdened with enforcing such laws against such offenders?

A rational code of sex offender laws would, moreover, basically revise some of our

²⁵ E.g., CONN. GEN. STAT. REV. § 53-226 (1958); DEL. CODE ANN. tit. 11, § 731 (1953); FLA. STAT. § 796.07 (Supp. 1959); N.C. GEN. STAT. § 14-203 (1953); TEX. PEN. CODE art. 607(20) (1948); WYO. COMP. STAT. ANN. § 9-508 (1945).

²⁶ E.g., CONN. GEN. STAT. REV. § 53-231 (1958); ILL. REV. STAT. ch. 38, § 162 (1957); IND. ANN. STAT. § 10-4219 (1956); WYO. COMP. STAT. ANN. § 9-517 (1945).

²⁷ Cf. *State v. Rayburn*, 170 Iowa 514, 153 N.W. 59 (1915).

²⁸ E.g., IND. ANN. STAT. § 10-4220 (1956); WYO. COMP. STAT. ANN. § 9-518 (1945).

²⁹ E.g., IOWA CODE § 724.1 (1958). For a summary survey of the penalties imposed by the prostitution statutes of the several states, see SHERWIN, *op. cit.* *supra* note 7, pt. 2, chart 4A, at 68.

present concepts in this area. Thus, for example, although force, violence, and overpowering of the will of a female by violence, threat, or fear of bodily harm would continue to be the core of the crime of rape, it is to be hoped that the new formulation would not comprehend those cases where a man may have used considerable effort to persuade a woman to engage in coitus with him, where this was the normal and expected outcome of their association together. Moreover, since most rape convictions involve consensual acts of coitus with young girls, with no element of force or violence, it has long been apparent that the legal age of consent must be reduced. Many girls of fifteen, sixteen, and seventeen years of age voluntarily enter sexual relations with men and boys. Each such sexual contact may technically be rape under some law and may subject the male involved to ferocious penalties, although except for the age of the girl involved, the act may be no different than fornication.

At common law, the lack of appreciation and understanding by a child under ten years of the nature and quality of the sexual act—and her consequent inability to consent to it—was justifiably assimilated to the force and violence and overpowering of the will in the traditional definition of the crime of rape. In our desire to shield young women from sexual experience, we have extended the age limits upward. It is absurd in our culture, however, to talk of young women of middle or late adolescence not having knowledge and appreciation of the sexual act. Such knowledge is usually acquired by the time of puberty. The law should, accordingly, take a more realistic view and fix the age of consent at fourteen years, instead of the higher limits that are more commonly found. Should the legislator wish to protect the morals of young women over fourteen years of age, this can be done by means other than branding as a rapist every male who may dally with them.

But whether or not the age of consent is reduced, it is imperative that the lack of chastity of the young woman be deemed a defense to a charge of statutory rape. It is ridiculous for the police to charge with rape every male who may have had sexual contact with a promiscuous young woman or a young prostitute. The law should, moreover, take into account the age of the male involved in defining this offense. Boys and girls of similar ages engage in many forms of sex activity, and if this leads to coitus, the boy should not necessarily be exposed to penal sanctions.

Also vitally essential in any revision of sex offender laws is a reconsideration of the evidentiary rules, so as to minimize the possibility of convicting innocent defendants. Complaints of sex offenses are easily made. They spring from a variety of motives and reasons. The psychiatrist and the psychoanalyst would have a field day were he to examine all complaints of rape, sexual tampering with children, incest, homosexual behavior with young boys, deviant sex behavior, etc., in any given community. He would find that complaints are too often made of sexual misbehavior that has occurred only in the overripe fantasies of the so-called victims. Frequently, the more or less unconscious wish for the sexual experience is converted into the

experience itself. Sometimes, too, the so-called victim will charge not the one with whom he or she has had the sexual experience, but someone else who is entirely innocent. Prosecuting attorneys must continually be on guard for the charge of sex offense brought by the spurned female that has as its underlying basis a desire for revenge, or a blackmail or shakedown scheme.

Where the law permits, as it does with respect to many sex offenses, a conviction on the uncorroborated testimony of a complainant, it puts a premium on unfounded complaints. There is no barrier against convicting the innocent, except the good sense of prosecuting attorneys, courts, and jurors. But the moral indignation that is stirred up by a recital of dastardly behavior apparently often overrides good sense, and as a result, far too many men have been railroaded on sex offense charges. Accordingly, no conviction on a sex offense charge should be had where the testimony of the so-called victim is not corroborated by "other material evidence." It is true that such a requirement may result in guilty men escaping just punishment in cases where other evidence is not available. But the dangers involved to innocence where the law makes it possible to imprison a man on the uncorroborated testimony of a disturbed child or spiteful woman outweigh the necessity for obtaining convictions in sex offense cases.

Any revision of sex offender laws must also repeal much of the sexual psychopath legislation that is presently in force. These laws were passed to provide a means for dealing with dangerous, repetitive, mentally abnormal sex offenders. Unfortunately, the vagueness of the definition of sexual psychopaths contained in these statutes has obscured this basic underlying purpose. There are large numbers of sex offenders who engage in compulsive, repetitive sexual acts, which may be crimes, who may be mentally abnormal, but who are not dangerous. The transvestite, the exhibitionist, the frotteur, the homosexual who masturbates another either in the privacy of his bedroom or in a public toilet, the "peeping tom"—are typical of large numbers of sex offenders who are threatened with long-term incarceration by present sexual psychopath legislation. And what is even worse is that such legislation has not usually been implemented by facilities for treatment. The result is that many nuisance-type, nondangerous sex offenders have been imprisoned for long periods of time, without treatment, in those jurisdictions where such laws have been enforced. This is not to say that the compulsive nondangerous types of sex offenders should be immune from prosecution and punishment; but short sentences or probation are more than adequate to deal with these derelictions, unless better treatment facilities are provided.

In scooping up minor compulsive sex offenders, moreover, sight has been lost of the basic objective of sexual psychopath laws—namely to provide long-term incarceration for dangerous, repetitive sex offenders. Such offenders will be found primarily among those who show a pattern of using children as sexual objects and those whose sex offenses are marked by incidents of sadism and brutality. Such

individuals can be dealt with just as effectively by traditional methods of law enforcement as under sexual psychopath laws. Obviously, the law should provide long-term prison sentences for dangerous sex offenders—up to life imprisonment, if necessary. It should permit such offenders to be paroled only on a showing of demonstrated improvement and rehabilitation. It should permit such offenders liberty only under the continued supervision of a parole officer and should facilitate their re-incarceration, if they exhibit signs of relapse into the kinds of sexual misbehavior that brought about their incarceration in the first instance.

These are but a few of the many problems that must be met in any revision of sex offender laws. Many have already been considered by the American Law Institute in its Model Penal Code project.³⁰ The specific recommendations that have eventuated cannot be analyzed here, but they deserve consideration by those interested in more rational sex offender legislation. The Institute is to be commended for undertaking so controversial a task that characteristically generates far too much heat, stirs entirely too much emotion. Radical departures from existing law in this area conceivably may imperil the acceptance of the Model Penal Code as a whole, and caution might have dictated the deletion of sex offenses from the agenda. Accordingly, it is to the credit of the Institute that it has met the challenge openly and is laying the basis for a more rational code of sex offender laws than is to be found on the statute books of any state.

³⁰ MODEL PENAL CODE art. 207 (Tent. Draft. No. 4, 1955; Tent. Draft. No. 9, 1959).

SEX OFFENSES: AN ANTHROPOLOGICAL PERSPECTIVE

CLELLAN S. FORD*

INTRODUCTION

When examining the controls that are imposed upon a type of behavior in our society, it may be useful to have before us a general perspective, a frame of reference obtained from a study of a number of societies quite different from our own. To provide this frame of reference as a background for the assessment of controls imposed upon sex behavior in this country, a cross-cultural study of sex-control was conducted¹ utilizing primarily the materials contained in the Human Relations Area Files.²

To understand our own particular ways of life, our attitudes toward sex, and the formal legislation concerned with sexual matters, it is of paramount importance to have a knowledge of the history of American life-ways. Much has been written on the historical backgrounds of modern European and American sexual behavior.³ These studies, together with current sociological and psychological studies of sexual behavior and its social control in this country, provide us with considerable understanding of the situation as it exists in the United States today. Perhaps this is all that is required for an assessment of our moral and legal codes with respect to sex behavior. But it may be that the broader picture provided by the comparative analysis of comparable codes in a number of relatively uncivilized societies may prove to add a useful dimension for evaluation.

The purpose of this article is to provide this broader picture of human sex behavior in societies that have developed their ways of life apart from the great oriental and western cultures. It is by no means a complete picture such as would emerge if the social controls imposed upon sexual behavior in the majority of pre-literate societies had been examined. The information used in this analysis relates to a relatively small sample of the world's societies—200 in all.⁴ And the informa-

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¹ This study is an extension of one aspect of the research that was reported in CLELLAN S. FORD & FRANK A. BEACH, *PATTERNS IN SEXUAL BEHAVIOR* (1951).

² This is a research organization composed of 18 member universities that was established in 1949 as a nonprofit corporation with the aim of collecting, organizing, and distributing information of significance to the natural and social sciences and the humanities. The details of this undertaking are elaborated more fully in *HUMAN RELATIONS AREA FILES, A LABORATORY FOR THE STUDY OF MAN* (1959) (obtainable on request from HRAF, Box 2054, Yale Sta., New Haven, Conn.).

³ Perhaps the most informative single source is RICHARD LEWISOHN, *A HISTORY OF SEXUAL CUSTOMS* (Alexander Mayce transl. 1958).

⁴ A compendium of the ethnographic files completed or approaching completion, upon which this study has been drawn, is set forth in an appendix hereto.

tion on them is not as complete as one might wish. But at the same time, these societies do represent a considerable range of behavior and do provide us with some perspective that may be useful when evaluating the status of our own codes with respect to sex behavior.

I

THE FAÇADE OF DIVERSITY

From this comparative analysis, it appears that all societies exert both formal and informal controls over sex behavior. There is, however, an extraordinary diversity in emphasis, in terms of both the kinds of behavior controlled and the circumstances under which controls are imposed. Particularly striking is the fact that people can live lives that are apparently so different from our own—and they have lived and survived that way now for a long time. We find, for example, that there are societies in which the only restriction on sexual activities during childhood and adolescence is the local variation of the incest prohibition. Self-stimulation and both homosexual and heterosexual play on the part of young people are regarded as acceptable and normal activities. By contrast, we find that there are other societies in which all sexual activities on the part of children and adolescents are even more strictly forbidden than they are in puritanical parts of the United States. Knowledge of sexual matters is rigidly excluded from young people's education, and any tendencies they show to experiment in this direction are promptly and rigidly opposed by adults.

We find that in some societies, puberty comes and sexual maturity is reached with very little notice. In other societies, by contrast, there are elaborate rites that mark the transition from childhood to adulthood. For the girl at menarche, these ceremonies may involve a prolonged period of seclusion during which she is instructed in sexual matters and etiquette by older women. She may be tattooed or scarified, her teeth filed or knocked out, her genitals mutilated. Once the instruction and ordeals are over, the girl is greeted as a full-grown woman, a coming-out party is held, and she is considered marriageable.

In some societies, young men are similarly secluded, instructed in matters of etiquette, and mutilated. Such periods of so-called schooling may last for only a few months or may extend as long as several years. The initiation, as in the case of girls, may involve tattooing, scarification, and genital mutilation. The ordeals may be so severe that occasionally youths fail to survive them. The training practices of the Marine Corps seem mild by contrast.

Practices of mating also present considerable diversity. In some societies, this occurs early in life; for others, it is delayed until quite late, so that full reproductive maturity is achieved prior to marriage. The form of marriage, too, varies from society to society. In many, a man is not only permitted, but expected to obtain more than one wife; in a few, the woman is expected to have more than one husband; and in still others, there is even stricter monogamy than we practice and divorce is so rare as to be practically unknown.

Controls imposed upon extramarital sex affairs also are markedly different from one society to the next. In some, both men and women are severely curtailed in this respect; in others, there are periods of ceremonial license, practices of wife-lending, or wife exchange; and in still others, there is relative freedom, particularly for men, and very little censure falls upon the married man who is successful in obtaining the sexual favors of some woman other than his wife.

Prostitution is not a problem in these societies. Nothing comparable to prostitution as it appears in civilized western societies today, or as it existed in the form of temple prostitution among the ancients of the old world, is to be found in the societies of our sample. There are widespread customs of gift-giving as a prelude to or aftermath of sexual favors, oftentimes an exchange of gifts between the sex partners. But these customs can scarcely be thought of in the same light as prostitution, in which sexual favors are traded for a price. They are much more akin to the small favors a suitor in our society may bestow upon the girl of his choice in the form of candy or flowers.

On the other hand, homosexuality, both male and female, is quite commonly reported for many of these societies, and, for some of them, it constitutes a problem, in the sense that they attempt to prevent its occurrence. About one-third of the societies surveyed strongly disapproves of homosexuality, especially in males, and attempts from early childhood to combat any tendencies in this direction. Generally, the sanction imposed is ridicule and derision—although in a few, stronger measures are taken. A very few are so opposed to homosexuality that detected offenders are put to death.

In the remainder of these societies, homosexual behavior, in one form or another, is considered normal and socially acceptable for certain members, or at certain periods along the lifeline. Male homosexuality appears to be more commonly practiced than female homosexuality. Frequently, certain men in a society dress like women, perform female tasks, and play female-like roles in sexual relations with males. In some societies, the man who adopts the role of a women is highly respected and may at the same time occupy the position of a powerful shaman. In other societies, male homosexuality may be expected of all young men in connection with initiation ceremonies.

Along the lifeline, too, there are other controls that may or may not be imposed upon sexual activities. Women, for example, may be forbidden sexual intercourse during menstruation, during all or part of pregnancy, during the postpartum period, and even during the entire period of lactation—two to three years or more. On the other hand, there appear to be societies in which none of these restrictions applies. Women may have intercourse during their menses if they so desire, no restrictions are imposed during pregnancy, and the postpartum period is brief and intercourse resumed soon thereafter. In some societies, there are numerous occasions for abstinence on the part of both men and women. Commonly, before fishing, hunting, or going forth to battle, during certain religious periods, and during mourning, inter-

course is avoided. By contrast, sexual activities are not only permitted on certain religious and important occasions, but may be mandatory for some people.

The examples presented convey only a partial picture of the diversity in ways of dealing with sexual behavior as obtained through an examination of a number of different societies. But it will serve to demonstrate the point that there is great variation in this respect as one moves from one society to another. This rather extraordinary diversity is somewhat puzzling and requires explanation. We do not yet know what may account for the quite different ways in which people control sexual activities, but a few general matters seem to be relatively clear.

First, there does not appear to be any relationship between the customs that seem the farthest removed from our own and what we might think of as the least advanced or primitive people. Many of our own ways of life are shared by the least civilized. Our monogamous mateship, for example, is to be found among the very primitive Andaman Islanders, whose numbering system stops at three, and the Apinaye of North Central Brazil, peaceful planters with a crude technology. By contrast, our own Mormons, up until some few generations back, practiced polygyny and were certainly not a retarded, primitive people.

Furthermore, it is clear that all is not completely relative and that there are no limits set to the sexual behavior of the members of a society, save traditional and arbitrary codes and attitudes. On the contrary, a comparative study of the social control of sex behavior along the lifeline reveals an extraordinary set of uniformities lying beneath the façade of diversity. Humans are much alike everywhere, and human societies have much in common with each other. People everywhere have a common heritage from organic evolution, the same urges and emotions, the same capabilities for learning and behaving. Through living together, people have faced much the same problems everywhere in their interpersonal relationships. They thus have a comparable heritage from societal evolution, the ways of living and surviving that have been learned, modified, and incorporated into their life-ways.

Nor does the fact of the existence of diversity in the handling of sexual matters from one society to another imply that behavior that may be approved in some other culture, but not our own, is to be recommended for an American. The fact that a number of societies find it congenial for their children to cohabit for several years before marriage is not to say that parents in our society could also take such an attitude lightheartedly. Our society has a structure and culture that is not equally congenial to such behavior, and all sorts of complications would arise were parents suddenly to modify their moral codes in this or other respects.

Conversely, it is clear from the experience of missionaries with indigenous peoples that the artificial imposition of our codes of morality can have disastrous results in terms of the total adjustment of a people and their ways of life. Practices that seem not only meaningless, but downright perverse from our point of view may, in fact, be functional and useful from the point of view of the existence and survival of a particular society. The apparently very cruel and sadistic-like initiation cere-

monies involving genital mutilations as inflicted upon young boys in certain parts of the world may, in effect, be extremely useful in imposing upon the victims a measure of responsibility and preventing outbreaks of adult aggression that could disrupt their social life.

As indicated above, there is a surprising uniformity characterizing the social control of sex behavior in human societies despite our initial impression of diversity. It may be useful to specify these uniformities in somewhat greater detail. We may begin by examining the controls imposed during childhood and adolescence.

II

CONTROLS OF CHILDHOOD AND ADOLESCENCE

Perhaps at the outset, we should state a little more precisely what is meant here by childhood and by adolescence. By childhood is meant the period in a young person's life that extends roughly from the time when he or she begins to walk and talk to the time when signs of puberty appear and are recognized. Puberty, derived from the Latin *pubes*, meaning hair, is recognizable in the male by the appearance of hair under the armpits and around the genital region. There are other changes that may be pronounced and noticeable, too, such as the deepening of the voice. Usually, the onset of puberty in the male occurs about the age of fourteen. In the female, puberty is dramatically announced by the appearance of the first menses. This generally occurs around the fourteenth year, although menarche may appear either some years earlier or later. Variations in age at onset of puberty are believed to be the consequence of hereditary and dietary factors, but, in fact, very little is known about the variables involved. Climate, apparently, has little or no effect.

For both the boy and the girl, the onset of puberty marks the beginning of sexual maturation. The period between puberty and full reproductive capacity is referred to as adolescence. This is roughly between the ages of fourteen and eighteen for the young man and fourteen and twenty for the young woman. Thus, when adolescents are referred to here, they are, generally speaking, the equivalent of what most Americans may think of as "teen-agers." The fact that puberty and full reproductive maturity do not coincide temporally turns out to be a matter of considerable importance, and this subject will be returned to later in this article.

In any consideration of the controls exerted over the sexual behavior of children and adolescents, it is useful to have in mind some notion of the behavioral heritage that young people have from organic evolution. It seems clear that man's evolutionary heritage has given children both the capacity and a progressively (along the lifeline) stronger tendency for sexual activity of a generalized sort. This type of activity, prior to reproductive maturity, may be referred to as sexual play, since it has no direct reproductive function, and is, thus, not an unnatural thing for children to display. On the contrary, such behavior is to be expected unless social controls intervene to inhibit them.

Generally speaking, children are brought up within the framework of a family. As is well known, the form of marriage differs from one society to the next. Some are strictly monogamous, others permit a man to take more than one wife, and some (although examples of this are rare) permit a woman to take more than one husband. The formal rulings to which a society adheres in this respect are more divergent, however, than the actual practice. In most of the societies that permit polygyny, relatively few males spend much of their lives with plural wives. In the first place, it appears that in many polygynous societies, only a few men can afford more than one wife, and by the time they can do so, they are well along in life. There are, to be sure, some societies in which there are a number of polygynous households, but these are not as great in number as one would expect from the formal rules concerning plural wives as reported in the literature. The picture that emerges is that for the most part, people live as mated pairs with their children, but that in a number of societies, some men may serve as husband to two or more women and as father to their children.

The degree to which the family is integrated into the social life of the community varies from society to society. From the point of view of the growing child, the type of integration to which he is exposed is probably of considerable importance. Of special importance in terms of controls over sexual activities in childhood and adolescence is the way in which young people are considered to be related to the other members of the community outside of the nuclear family.

A. The Incest Taboo

The child born in any human society finds himself, then, a part of a family unit. He will be part of larger groupings as well, local and kin, but for the moment, let us see what the family has in store for him. As far as his sex activity is concerned whatever additional controls may be imposed, there will be always one. Apparently in all human societies, for at least the general population, there is a firm prohibition against primary incest—that is, sexual intercourse between son and mother, daughter and father, and brother and sister. There are exceptional instances in some societies, where a small segment of the group is expected by custom to have intercourse with or to marry a primary relative. Among some African societies—the Azande, for example—a chief is expected to have sexual relations with his daughters. And royal families in some societies—such as the Incas of Peru—insisted upon brother-sister matings. But instances such as these are uncommon in cross-cultural perspective.

Incestuous liaisons are not, of course, unknown. They apparently do occur in many societies—as, indeed, they do in the United States. But their occurrence is not approved of among any known society by traditional moral standards. If they are detected, such liaisons are generally the subject of public censure. In some societies, severe punishment up to and including the death penalty may be imposed upon the offenders.

We do not know how and when human societies incorporated into their life-ways the prohibition against primary incest. It does seem clear, however, that it is a part of man's heritage from experience, and not something with which he was endowed at the outset through organic evolution. The twin facts that incestuous relationships can and do occur and that all societies apparently have found it necessary to exert controls over such activities tend to negate any assumption that there is an innate, biological, abhorrence of primary incest. There is a good deal of psychiatric evidence that attraction between son and mother, daughter and father, and brother and sister is quite strong for some individuals in our own society, but has been repressed and fails to find other than fantasy expression. Comparable evidence from dreams and folktales reveals a similar situation in many preliterate societies.

This does not necessarily mean that there is any biologically-given urge for sexual relations with one's parent or child or sibling. It is more likely to be the case that the child comes into the world unbiased in terms of specific targets for sexual advances. Other things being equal, it would seem likely that as his or her sexual interests mature, the growing child would turn to those nearby who have facilitated his other needs and given gratification in other respects. This would seem only natural, unless it were prevented. This, indeed, is what appears to be the case. In other words, it appears that the maturing sex impulse in humans has the objects of its choice defined through experience rather than through any biological inheritance of revulsion or attraction.

As indicated previously, we do not know how or when the prohibition on primary incest developed. But it is not difficult to imagine how it could have arisen, given the existence of a relatively stable family group. When children are maturing, they are physically at the mercy of their parents. It is not difficult to imagine that competition between a son and father for the same sexual partner would result in the younger one being put in his place. The daughter competing with her mother for the same man would be equally at a disadvantage. The intervention of parents in affairs between their children could easily represent an extension of their dominance over the children's sexual advances toward one or the other spouse. However this may be, the incest prohibition does apparently tend to minimize rivalries within the family, and this function gives the custom considerable survival value. Internal rivalries within the family are generally bad enough as it is without adding sex to the disruptive forces.

The incest prohibition has still another advantage from the point of view of societal survival. It ensures that matings take place outside the nuclear family, thus widening the circle of those who are likely to co-operate with one another in the struggle to survive and band together in face of danger. It also provides for variation in ways of life by bringing together individuals brought up in different families.

The contention that primary incest, if practiced, would be detrimental to human populations from a biological point of view may or may not prove to have merit. The evidence in support of this hypothesis is so scanty that no conclusions can be

drawn at this time. Certainly, there is no evidence at all that hereditary disadvantages to such close inbreeding gave rise to the incest prohibition, even though the prohibition may have some biological survival value.

The prohibition on incest rarely, if ever, is confined to primary relatives; it extends to other relatives as well. Those thus included vary from one society to the next. In some societies, these are relatively few in number—including, for example, only secondary relatives, such as father's sister, mother's sister, sister's daughter, and brother's daughter. But in a great number of societies, the incest prohibition is extended very broadly—so broadly in many as to preclude intercourse for any individual with half or more of the available members of the opposite sex. This extension of the incest taboo to other than primary relatives has been the object of careful investigation, and it has been related to the kind of social organization and kinship system characterizing each society.⁵

There would seem to be some advantage to the wide extension of the incest prohibition. If it is effective, it limits the number of persons potentially competing for the same sex partner, thus reducing the number of persons involved in direct rivalry with one another. It may mean fiercer competition to be sure, but with relatively few competitors. And the persons with whom the individual competes are more often than not related to one another in such a way as to prevent the rivalry from becoming open hostility and disruptive to the solidarity of the group.

These societal incest taboos, then, provide the basic framework within which the control of a child's sexual activities will be exercised throughout a lifetime. For most societies, we do not know precisely at what age and how this prohibition is inculcated. Generally speaking, it appears that the teaching of the prevailing incest regulation is begun in early childhood, as soon as the young people can talk, as an integral part of the inculcation of the customary and traditional morality.

B. Other Sexual Restraints

The incest prohibition may not be the only restriction the child faces as he begins to mature. In some societies, as is the case in our own, any evidence of sexual excitement in young boys and girls is something to be avoided and discouraged. In cross-cultural perspective, it appears that if restrictions in addition to the incest prohibition are not placed upon growing boys and girls, a certain amount of sex play spontaneously occurs. As they explore their own bodies, children find that they can stimulate their own genitals. As they grow older, they may stimulate the genitals of their playmates. They may simulate coitus in imitation of their elders, especially in societies where there is an opportunity for young people to observe their parents copulating.

For many societies that take a tolerant attitude toward sexual activities in their young people, there is, in addition, free discussion and often detailed instruction in sexual matters. The adults apparently feel that this is an important part of their

⁵ Perhaps the most comprehensive study of this matter is GEORGE P. MURDOCK, *SOCIAL STRUCTURE* (1949).

education, and considerable pains are taken to make sure that the children are properly instructed in all phases of sexual activity and the process of reproduction at an early age. For example, on Ponape, children are given careful instruction in sexual intercourse at the age of four and five.

Among a few societies, the picture is precisely the reverse, very much as it is among ourselves. Here, children are denied any form of sexual expression that is detected by elders. They are warned not to finger their genitals and to avoid any homosexual or heterosexual contact, and they are forbidden to play any games that seem to have sexual connotations. In these societies also, there is conscious attempt on the part of the adults to prevent children from observing sexual behavior and even to refrain from discussing sexual matters in the presence of young people. The Kwoma of New Guinea, perhaps, typify this attitude in clear-cut fashion. Kwoma boys are constantly warned not to finger their genitals. If a woman sees a boy with an erection (they do not wear clothing), she will strike his penis with a stick. Girls also are told not to finger their genitals. Husband and wife in this society are always careful to wait until the children are asleep before indulging in sexual intercourse.

Of course, as in our own society, the formal attitudes toward children indulging in sexual activities do not necessarily mean that such behavior does not occur. Indeed, in American society, as revealed by Kinsey and his associates and others,⁶ considerable sex activity takes place in relative secrecy from adults, both during childhood and adolescence. It may well be that this is the case in other societies where the formal attitude is harsh and discouraging.

The great bulk of the societies surveyed are neither wholly permissive nor rigidly strict with regard to the sex behavior of their children. They seem to take the attitude that such activities on the part of children are to be somewhat discouraged, but not too seriously. The children are supposed to be relatively discreet about their sexual activities and are rarely punished unless the transgression is especially flagrant. Some of these societies are more strict about sexual behavior before signs of puberty are detected.

In the light of the cross-cultural evidence, relatively more pressure is placed upon the growing girl to avoid sexual activities than upon the boy. As in our society, there is in most something of a double standard, with the main responsibility resting upon the girl, and the boy relatively free to get away with as much as he can. This, however, is not always the case. Indeed, there are some societies, as with many African peoples, where the responsibility is directly placed upon the growing boy. They are strictly forbidden to attempt coitus until they have gone through the customary puberty ceremony, and in many, the punishment for transgression is death.

The explanation for the differences in attitudes on the part of adults toward the sexual behavior of children and adolescents is not clear. It might be anticipated

⁶ ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

that the negative and restrictive attitudes reflect concern with premarital pregnancy. In other words, societies that seem especially upset if a girl becomes pregnant before marriage might be the ones that attempt to prevent such a calamity by instilling strict controls over sexual activities beginning at an early age. If marriage, for economic or other reasons, is delayed beyond puberty for any great length of time, it would seem probable that considerable pressures or other means would have to be employed if premarital pregnancies are to be avoided.

The probability of sexual intercourse resulting in conception, however, is not clear-cut and completely understood. Sexual maturation in girls and boys is a gradual process that takes several years before they are capable of reproduction. The signs everywhere noted to indicate puberty do not appear to coincide with attainment of reproductive maturity. In the girl, her first menstruation serves everywhere as a dramatic indicator of the onset of puberty, but it may be several years after menarche before the adolescent girl is capable of being successfully impregnated. Evidence from those societies in which adolescent boys and girls regularly indulge in sexual intercourse reveals that only rarely do pregnancies occur for some years after the first recognition of puberty.

Nevertheless, it does seem to be the case that many of the societies that are particularly concerned about premarital pregnancy are the most particular about the sexual behavior of adolescents and children as well. Indeed, for many societies, an unmarried girl's pregnancy is the only real cause for concern. Premarital sexual affairs may be disapproved of in those societies, but permitted to go unnoticed as long as pregnancy does not occur. In a few societies, this is clear-cut and explicit to the point that contraceptive measures are taught the young people and they are told to use them with care.

It is interesting to note in this connection that for a few societies, the attitude is just the reverse. Premarital sexual affairs are permitted and encouraged as a testing ground, as it were, for fertility. Only after a girl has demonstrated that she can conceive is she considered eligible for marriage. This is of particular interest in view of the well-nigh universal acceptance of a wife's childlessness as cause for divorce.

Along somewhat the same line, some societies believe that neither boys nor girls will mature sexually without the benefit of sexual experience. They consider that all phases of sexual maturation—the capability to conceive, to enjoy sexual expression, to achieve proficiency in coitus—depend upon practice beginning early in life; and children are encouraged in this direction. Some also feel that living together as husband and wife should be practiced and experimented with before actual matrimony takes place.

If we now review the general picture, as revealed by this cross-cultural examination of social controls during childhood and adolescence, the following facts emerge: First, control always occurs in the context of the local incest regulations. Second, the

great majority of societies disapprove of flagrant and public sexual activities by both children and adolescents. Third, children and adolescents everywhere, even in societies where chaperonage is strict and very heavy punishment is threatened for transgression, do engage in some form of sexual activity—self-stimulation, and homosexual and heterosexual activities alike—with an emphasis upon heterosexual coitus during adolescence. Apparently more easily controlled are the specific objects of sexual interest, and the prevailing incest regulations seem to be, for the most part, effective. A fourth general observation is that there does seem to be considerable cross-cultural evidence for the probability that there is quite a long period of adolescence in girls, after menarche, during which they are not fully sexually mature in the sense of being able to conceive and bear a fetus to term.

It is tempting also to hazard the generalization that most societies have found it useful, or at least not detrimental to their welfare, to permit a certain amount of sexual expression on the part of children and adolescents. As long as the prevailing incest regulations are observed and other sexual activities are kept under some control and are not too noticeable, the solidarity of the social group can be maintained without being very much concerned over the sexual activities of young people.

It is too early in our investigations to say with any firm assurance what the varying effects of the different attitudes toward sex in young people may be on the individuals thus maturing. It does seem probable that to insist that all sexual activities be delayed until the wedding night and then to expect the young married couple to perform sexually in a fully satisfactory manner is asking a great deal.

A further matter that requires additional investigation is the possibility that strict sex codes that condemn sexual activity as such may produce difficult conflict situations for young people, since the evidence so overwhelmingly indicates that no matter what parents may do or say, a certain amount of sexual expression is likely to occur. This is an avenue for future research that should prove illuminating.

The relationship of social control over sexual expression and marital adjustment also requires further investigation of a comparative nature before it can be specified with assurance. The studies so far made have been conducted within the framework of our own society. The evidence for Americans tends strongly to suggest that the more inhibited the sexual expression in early life, the more difficult the sexual adjustment in marriage, and that this, among other factors, may be responsible in some instances for an unsuccessful marriage. What we need to know now is whether or not this is also the case in other restrictive societies, and whether the reverse is true of those societies in which a lenient attitude toward early sex activities is the characteristic pattern.

III

CONTROLS OF ADULTHOOD

We now turn to a consideration of social controls imposed upon sexual activities during adulthood. It is convenient to divide this examination into two parts: control of sex behavior within marriage, and control of extramarital sex behavior.

A. Marital Sexual Restraints

Within marriage, there are generally prohibitions against a woman having intercourse during her menstrual period. There are only few societies in cross-cultural perspective that consider the menstruating woman a fit sex partner. Occasionally, intercourse with a woman during menstruation is prescribed under certain circumstances. For example, the Marquesan husband is enjoined to have intercourse with his wife if her period is unduly prolonged. In a few societies, a woman may have intercourse during her period if she so desires. But far more generally, the menstrual fluid is considered to be dangerous and unclean. The intimate contact with the menstrual fluid such as that afforded by the sex act is something to be strictly avoided.

In some societies, the prohibition against sexual contact is the only restriction imposed upon the woman during menstruation. In others, she may find additional ones imposed upon her: the avoidance of certain foods, the discontinuation of bathing, and the avoidance of participation in certain forms of social activities such as dancing or feasting. In other societies, the restrictions are even more elaborate and rather completely circumscribe her normal activities. Some force her to remain inactive and in seclusion during her period, either in a special compartment within the dwelling or in a hut set apart, where she is tended by older women.

Apparently, wherever any prohibitions at all are imposed upon the menstruating woman, the prohibition against sexual intercourse is present, thus indicating that it is the intimate contact of the male with the menstrual fluid that is of primary importance. This would suggest then that the additional prohibitions surrounding the woman's activities at this time are predominantly an extension of this fundamental concern. In this connection, it is important to note that the menstruating woman has no muscular control over the flow of blood. Unlike other excretory activities, such as urinating and defecating, the menstrual flow cannot be controlled through voluntary muscular tension. Unless she is provided with some means of preventing the dispersal of the fluid, such as an absorbent plug or pad, she can only keep from contaminating various parts of her environment by avoiding them.

Societies apparently vary in the degree of horror and disgust with which they regard the menstrual fluid. If this feeling is intense, it seems that the woman may be secluded during the period, thus preventing any chance of contamination, whether she is provided with any mechanical means of controlling the flow or not. If the feeling is less intense and one predominantly based on aesthetic values, as it is in our own society, the woman may be secluded or not, depending upon whether there is available for her the equivalent of an absorbent plug or pad. She may, in the latter instance, be permitted complete freedom, with the exception of engaging in sexual intercourse. If there is no horror or disgust of the menstrual fluid, as seems to be the case in a very few societies, no prohibitions apply and even coitus during menstruation may be permitted.

In most of the societies for which we have the information, it appears that cessation of the menses is regarded as a sign that pregnancy has occurred. In some societies, this is also the signal for a prohibition on sexual intercourse for the woman throughout her term. For other societies, there is no such prohibition during the early part of pregnancy, but one is imposed later on, as the woman increases in size and labor is considered to be only a month or so away. For a number of societies, it is reported that there are no restrictions on sexual intercourse for the pregnant woman. The details are not given, however, and it may be that some adjustment is actually made, in fact, as parturition approaches. In general, it thus appears that for most societies, there is a tendency to avoid intercourse during the later stages of pregnancy, or at least somewhat to modify normal sexual relations; and that for some societies, the prohibition is extended backward in time to cover most, if not all, of recognized pregnancy.

The prohibitions against sexual intercourse during pregnancy are generally supported by the fear that such activity will harm the fetus in one way or another. Some societies feel that it is likely to cause miscarriage or premature birth. Others are convinced that sexual intercourse may bring about deformities or even a stillbirth. This concern over the welfare of the fetus apparently accounts for the fact that the prohibition is levied directly against the pregnant woman's sexual activities. The husband is not similarly restricted, except in so far as the restrictions on extra-marital sexual affairs handicap him in monogamous societies. In polygynous societies, he may have access to other wives or to other sex partners. It is interesting to note that only one of the strictly monogamous societies in our sample forbids intercourse with a pregnant woman during the greater part of her term.

After childbirth, the woman in very many societies remains in seclusion for a period of from four to ten days; and for some, the period lasts from two to eight weeks. Even if she is not strictly secluded, the great majority of societies impose sexual abstinence upon the woman for a few weeks after her confinement. Some societies extend the period to several months, and some prohibit the woman to have intercourse during the entire period of lactation, which may last as long as two to three years. In rare instances, the husband has intercourse with his wife immediately after delivery. For these societies, the act is a ceremonial one and required by custom.

There appear to be two basic reasons for the avoidance of sexual intercourse with a woman after childbirth. The first pertains to the few weeks after delivery when the woman is still bleeding. Almost universally, this is a period of sexual abstinence. The second pertains to the probability of a new conception as soon as intercourse is resumed. The societies that insist that the woman abstain from intercourse throughout the period of lactation seem to be convinced that a new pregnancy would rather alter the mother's milk supply, thus forcing her prematurely to wean her child.

As is the case with the prohibition during a woman's pregnancy, the restriction of sexual intercourse after childbirth and during lactation refers to the mother. Her husband, in those societies where other sex partners are available to him, does not find his sexual activities similarly restricted. Again, it is interesting to note that for the most part, the societies insisting upon a long period of abstinence on the part of the new mother are polygynous. All the societies surveyed here that insist on the prohibition for the entire lactation period are polygynous.

We do not know the reasons for the differences in the controls exercised over marital sex behavior. In some instances, as in the case of intercourse during menstruation, during the first two to three months of pregnancy and just prior to labor, and during a few weeks' postpartum period, there seems to be medical justification for abstinence from sexual activity. No medical reasons justify control of sexual activity during the first year of lactation after the genitalia of the woman have healed, however, save for the possibility of another pregnancy.

In addition to these restrictions, which are tied closely to the reproductive cycle, there are others frequently imposed upon man and wife, as demanded by various circumstances and occasions. For example, in many hunting societies, the hunter, before undertaking an important expedition, is expected to be abstinent. Similarly, in warlike societies, the warrior may be forbidden intercourse prior to battle. Oftentimes, manufacturing processes—like pottery-making and canoe-building—are accompanied by sexual taboos imposed upon the participants. Religious events and ceremonies may also enforce abstinence.

What these social controls during married life mean to the people upon whom they are imposed we do not know. But it would be a most interesting matter to explore. How different must be the sex life of women in societies with no controls imposed upon her—save a mild one during her menses—as compared to others in which the maximum are in force. In societies of the latter sort, it would appear that there is a minimum of opportunity for sexual activity. Forbidden intercourse before marriage, thereafter during her menses until she becomes pregnant, then during all of recognized pregnancy, during the postpartum period, and for a couple of years of nursing, she finds the only time available to her for sexual activities to be the nonmenstruating intervals between successive pregnancies. One must conclude that women live quite different sex lives in these different societies.

With increasing age and the end of child-rearing and menstruation, social controls over the sexual behavior of the woman sharply drop to the point of nonexistence. No record is available from our investigation of a society interfering with marital sexual activities of women in later life, save that imposed when her spouse dies or when, for some reason or another, controls are exercised that have nothing to do with her physiological state. There is very little information available concerning the sexual activities of elderly married people in other societies, but it appears that at least they are little affected by social control.

B. Extramarital Sexual Restraints

The controls exercised over extramarital sex behavior vary from society to society; but, nevertheless, there is a somewhat surprising over-all uniformity in attitude. In our society, it is generally conceded that all sexual activities should take place within marriage. Both premarital and extramarital liaisons are frowned upon. Adultery is generally a ground for divorce if the fact of the act can be substantiated. There is abundant evidence that extramarital sexual liaisons do occur in our society; but for the most part, they take place in secrecy and are rarely brought to public notice.

A large number of societies seem to take much the same attitude that we do toward extramarital affairs. They are dead set against extramarital sexual liaisons, monogamous and polygynous peoples alike. For most of these societies, the pressures are leveled against the wife, or the wife and her lover. Relatively few seem to concern themselves directly with what the married man does. But he is hedged about with other restrictions, so that in most instances, he will find it difficult to find an unattached and otherwise acceptable sex partner.

The disapproval of sexual liaisons outside of marriage, and even the meting out of divorce and more severe penalties to the offenders, does not mean that violations of the moral code do not occur. In our society, as we earlier indicated, violations occur far more frequently than one would expect from a mere assessment of the articulated standard. But for the societies in our sample, there is little evidence concerning actual frequency of extramarital sexual liaisons in those where there is a general prohibition against such affairs. In some, the penalty for transgression is so severe that it surely must be an extremely inhibiting factor influencing the behavior of would-be lovers, and at the very least accounts for the secrecy with which extramarital sexual affairs are surrounded and the lack of information concerning them available to the investigator.

As in the case of premarital sexual affairs, a focus of concern for many societies is the possibility of pregnancy resulting from extramarital sexual liaisons. One of the leading reasons given for practicing abortion is that a pregnancy has resulted from an adulterous affair. Contrariwise, there are some societies in which children are accepted, whether or not the pregnancy is known to have resulted from an extramarital sexual affair. In direct contrast to the societies that take an all-out attitude forbidding extramarital sexual liaisons, there are a very few among those investigated in which there is no specific control over sexual activities outside of marriage.

There are some societies that verbally condemn extramarital sexual liaisons, but openly permit them, and no great harm seems to be done even if the affairs are rather public. All of these societies are polygynous, most of them with sororal polygyny, except for one—the Tubatulabal, who are exclusively monogamous. It is difficult to tell from the information, but it would appear that the extramarital sexual liaisons in these polygynous societies take place most frequently between partners who might, under other circumstances, be mated. There seems, for example, to be a high frequency of sexual liaisons between a man and his wife's

sister, to whom he might well be married under a system of sororal polygyny. In some, there appear also to be frequent sexual liaisons between a woman and her husband's brothers.

Wife-exchange and wife-lending are permitted and expected in some societies. For these, with the possible exception of permitted ceremonial license, to which we will come in a moment, other extramateship sexual liaisons are forbidden. Generally, too, in the case of wife-lending or wife-exchange, sexual access to a man's wife, or an exchange of wives, takes place on only carefully formulated occasions. Hospitality is frequently such an occasion, the guest being offered the host's wife. Usually, too, there is likely to be a return visit, with the former host visiting his guest and sleeping with his wife. In any case, the liaison takes place with public knowledge, and the permission of the husband in each instance is formally given.

A somewhat more general form of permissiveness with respect to extramarital sexual affairs is referred to in the literature as ceremonial license. Quite often, the occasion is religious in nature. It may be, for example, a harvest festival, a period of thanksgiving, or a mortuary feast.

We may now review the findings from this cross-cultural examination of the social control of extramateship sexual liaisons. The first striking fact that emerges is that mateship always characterizes the majority of the population and that extramateship sexual liaisons are always under social control—at the very minimum the control imposed by the primary incest prohibition and its local extension. Where custom permits, there seems to be a strong tendency for extramateships to occur within these limits, and particularly among siblings-in-law. Furthermore, it appears that where custom permits, women avail themselves as eagerly of extramarital sexual liaisons as do the men, thus negating the general principle that by organic heritage, man is more promiscuous than woman. Indeed, if one can judge the strength of a tendency by the severity and frequency of punishment meted out to control sexual activities, it would appear to be the reverse. In the societies that seek to control extramarital sexual liaisons to the point of preventing them altogether, the woman is the prime target of control for the most part.

Of considerable importance is the widespread attempt on the part of societies to control extramarital sexual liaisons. As has been noted, over sixty per cent of the societies in our sample attempt to exclude them altogether. Most of the remainder although permitting certain affairs to occur, always seem to have these well formalized and under control. Such customs as wife-lending and wife-exchange and even ceremonial license are rigidly bound into the social code and at all times kept in their place by formal regulation. Apparently, speaking generally, all societies have found it useful to keep extramateship sexual liaisons within bounds as a practical means of keeping intense sexual rivalry at a minimum. Of special interest in this connection is the fact that where extramateship sexual liaisons are permitted, they often take place between siblings-in-law—either real or socially determined. Apparently, the ties that bind brother to brother and sister to sister tend to prevent such

rivalry as exists between them to flare into open hostility, thus permitting an exception to the generally disruptive influence of sexual jealousy within the community. Finally, it is worthwhile to note that extramateship sexual liaisons, whether within the socially accepted frame of reference or clandestine and in secret, may well have adaptive value. Women who might otherwise not bear children may by this means become pregnant. Had they been confined during their productive lifetime to a single sex partner, they might have remained childless.

CONCLUSION

The picture of social control over sex behavior sketched above points out clearly that much more research is required before it will be possible to evaluate our own moral and legal codes in this area of activity on the basis of scientific understanding. We know too little about the relationships between social controls of sex behavior and other aspects of human living to be at all dogmatic about the relative desirability of this or that kind of legislation from the point of view of the welfare of either the individual or the society. At the same time, this means that our current moral and legal codes cannot be considered in any way unassailable. On the contrary, they are no more founded upon a scientific understanding of human behavior and social life than are those followed by the most primitive of human societies. Our attitudes toward sexual behavior are based not on science, but upon a traditional code of ethics and morals. They are clearly open to question and deserve careful investigation.

APPENDIX

WORLD ETHNOGRAPHIC SAMPLE

Human Relations Area Files

AFRICA

Pygmies & Khoisan: Hottentot (Nama), Kung Bushmen*

Southern Bantu: Lovedu, Mbundu, Thonga

Central Bantu: Bemba, Yao,* Ndembu*

Northeast Bantu: Chagga, Kikuyu, Nyakyusa

Equatorial Bantu: Fang, Ganda, Mongo, Rundi

Guinea Coast: Ashanti, Mende, Yoruba

Western Sudan: Mossi, Tallensi, Bambara

Nigerian Plateau: Tiv, Nupe, Katab*

Eastern Sudan: Azande, Shilluk*

Upper Nile: Luo, Nuer

CIRCUM-MEDITERRANEAN

Horn & Ethiopia: Amhara, Somali

Moslem Sudan: Hausa, Wolof

Sahara: Tuareg*

* Files scheduled for completion by July 1961.

North Africa: Riffians, Siwans*

Southern Europe: Yugoslavians

Overseas Europeans: Americans (Historical Massachusetts)

Northwest Europe: Irish*

Eastern Europe: Cheremis, Czechs, Estonians, Hungarians, Karelians, Lithuanians, Ukrainians, Russians (Soviet), Zyryans

Caucasia: Circassians, Abkhaz

Near East: Bedouin (Rwala), Jordanians, Syrians, Maritime Arabs, Kuwait

EAST EURASIA

Middle East: Iranians, Afghans

Central Asia: Buryat, Kazak, Uzbek, Khalka

Arctic Asia: Chukchee, Gilyak, Koryak, Ostyak, Samoyed, Yakut, Yukaghir
Kamchadal, Tungus

East Asia: Koreans, Chinese, Lolo, Miao, Yao, Pai-i

Himalayas: Burusho, Dard, Lepcha, Tibetans (Central), West Tibetans

North & Central India: Bhil, Bihar, Gujerati, Uttar Pradesh

South India: Coorg, Gond (Hill Maria), Kanada, Kerala (Nayar), Telugu (Shamirpet), Toda

Indian Ocean: Andamanese, Tanala

Assam & Burma: Burmese, Kachin,* Karen,* Khasi

Southeast Asia: Malays, Semang, Thai (Siamese), Vietnamese

INSULAR PACIFIC

Philippines & Formosa: Atayal, Ifugao, Apayao, Central Bisayans

Western Indonesia: Iban

Eastern Indonesia: Macassarese,* Ambonese,* Balinese*

Australia: Aranda, Tasmanians, Murngin*

New Guinea: Kapauku, Wogeo, Arapesh*

Micronesia: Marshallese,* Ponapeans,* Woleaians (Ifaluk)

Western Melanesia: Buka (Kurtatchi), New Ireland (Lesu),* Trobrianders, Orokaiva*

Eastern Melanesia: Lau Fijians, Malekulans (Seniang)*

Western Polynesia: Pukapukans, Samoans, Tikopia

Eastern Polynesia: Marquesans, Australs

NORTH AMERICA

Arctic America: Aleut, Kaska, Naskapi, Copper Eskimo

Northwest Coast: Tlingit, Yurok, Nootka*

California: Tubatulabal, Yokuts,* Pomo*

Great Basin & Plateau: Paiute (Surprise Valley), Sinkaietk, Havasupai*

Plains: Comanche, Crow, Mandan

Prairie: Ojibwa, Omaha, Pawnee*

* Files scheduled for completion by July 1961.

Eastern Woodlands: Creek, Iroquois, Delaware*

Southwest: Navaho, Zuni,* Tewa,* Cochiti*

Northwest Mexico: Papago, Tarahumara*

Central Mexico: Aztec, Pame (Chicimeca),* Tarascans*

SOUTH AMERICA

Central America: Cuna, Miskito

Caribbean: Callinago, Goajiro*

Guiana: Carib (Barama River), Yaruro

Lower Amazon: Mundurucu, Tapirape*

Interior Amazonia: Jivaro, Siriono, Witoto,* Tucuna*

Andes: Aymara (Modern), Gayapa, Inca*

Chile & Patagonia: Araucanians, Tehuelche, Yahgan*

Gran Chaco: Mataco, Guayaki*

Mato Grosso: Nambicuara, Trumai*

Eastern Brazil: Caingang, Timbira (Ramcocamecra), Tupinamba

* Files scheduled for completion by July 1961.

SEX OFFENSES: AN ETHICAL VIEW

JOSEPH FLETCHER*

INTRODUCTION

"St. Paul's advice is as sound today as it was two thousand years ago," says Morris Ploscowe. "It would be a great deal better if men and women remained continent sexually or got married and then adhered to their marriage vows. Much emotional disturbance, human misery, crime, disorder, and illegitimacy would be averted if humanity could abide by St. Paul's teachings. It never has."¹

Because the "flesh is weak" in most people some of the time and in some people most of the time, with resulting offenses either to the persons or the opinions of others in the community, the law has erected fences of prohibition and of penalty. How effective these fences are is, at the very least, questionable. One distinguished writer on jurisprudence, Edmond Cahn, has observed that "the criminal laws relating to sex have very little systematic enforcement anywhere. Most of them ought to have been repealed long ago."² There is some evidence, based on one serious, although debatable, attempt at research into sexual behavior, that if existing laws were actually enforced, about ninety-five per cent of the male population in America would go to jail.³ If this finding even remotely reflects the realities, it is plain that there is room to wonder whether our criminal sex laws are legally viable, and possibly also to question their ethical validity.

Why are these unenforced laws still on the statute books? Morris Ploscowe, in another place, has explained their presence as "dead letter legislation" kept there "because of the fear that a vote for repeal would be branded as a vote for immorality."⁴ Writing more than a quarter of a century ago, Walter Lippmann offered a second explanation, saying that "what everybody must know is that sexual conduct, whatever it may be, is regulated personally and not publicly in modern society. If there is restraint, it is voluntary; if there is promiscuity, it can be quite secret."⁵ Here, in these two comments, we have a large part of the reason for our continued lip service to unenforced sex laws: *fear of appearing indifferent to morality* if we advocate cutting out the dead wood, in the eyes of those who think by what recently

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¹ MORRIS PLOSCOWE, *SEX AND THE LAW* 271 (1951).

² EDMOND CAHN, *THE MORAL DECISION* 89 (1955).

³ ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 392 (1948).

⁴ PLOSCOWE, *The Place of Law in Medico-Moral Problems*, 31 N.Y.U.L. REV. 1238 (1956).

⁵ WALTER LIPPMANN, *A PREFACE TO MORALS* 286 (1929).

has been called the conventional wisdom;⁶ and the plain fact that *most sexual activity is clandestine* and, therefore, not easily subjected to control by public policy and judiciary. The rules of evidence in our law are such that the secretive nature of sexuality removes a great deal of it from ordinary criminal procedures.

However, "evidence" is a technical legal question and outside the scope of this article. The present discussion will be restricted to the ethical side of the problem. Lord Russell has asserted what he called "the well known fact that the professional moralist in our day is a man of less than average intelligence."⁷ In spite of the grim possibility that his harsh judgment may be well grounded, it is necessary, just the same, to place the whole question of criminal law and sex offenses within the ethical perspective and frame of reference. It is even possible that a "professional moralist" might share Glanville Williams's dissatisfaction over the present state of affairs in which "proposals to extend the law of crime and sharpen its penalties receive ready consideration, while proposals to restrict it are almost impossible to realize."⁸ If it is true that "law is the rule of reason applied to existing conditions,"⁹ then moral values and ethical analysis are an important part of that reasoning. Morality is as much at stake in our laws themselves as it is in the behavior which our laws ostensibly seek to regulate. Justice Holmes once remarked that "law is a statement of the circumstances in which public force will be brought to bear upon men through the courts."¹⁰ Since morality is meaningless apart from freedom, moralists naturally seek to reduce "legalism" to a minimum, keeping the range of choice and personal decision or responsibility as wide as possible. In the language of classical biblical theology in the West, grace reinforces law and sometimes even bypasses it, but it does not abolish it nor can it replace it until sin itself is no more.

There are some who seem to imagine that law and ethics can be divorced, as if law were not a matter of translating morals (value judgments) into formal social disciplines. Every law is the fruit of a decision about good and evil, right and wrong. "It is a pretty safe rule," as Felix S. Cohen once put it, "that whenever a judge says, 'This is a court of law,' and then goes on to say that he cannot be guided by moral or theological considerations, he is actually being guided by moral or theological considerations without knowing it."¹¹ There certainly are differing ethical doctrines; we do not all derive our values from the same source or, to alter the figure, base our norms on the same foundations and premises. A lawmaker's ethic, and a court's, may be utilitarian or hedonistic, based on a striving for happiness or pleasure as the highest good; or it may be a sheer duty-ethic, based on commandments from God or from some other authority such as the State or a Leader. But

⁶ See J. KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 7-20 (1958).

⁷ BERTRAND RUSSELL, *MARRIAGE AND MORALS* 88 (1929).

⁸ Williams, *The Reform of the Criminal Law and of Its Administration*, 4 J. SOC'Y PUB. TEACH. L. 217, 221 (1958).

⁹ *City of Milwaukee v. Milwaukee Elec. Ry.*, 173 Wis. 400, 406, 180 N.W. 339, 341 (1920).

¹⁰ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

¹¹ Cohen, *Judicial Ethics*, 12 OHIO ST. L.J. 3, 10 (1951).

whether pragmatic or formal, there *is* an ethic at work, no matter how covert or obscure it may be.

Some forms of sexual activity are historically and conventionally related to criminal law, such as fornication, adultery, abortion, bigamy, indecent exposure, rape (both forcible and statutory), homosexuality, prostitution, psychopathic sexuality, incest, and crimes against children. The problem of obscenity might be included, along with pornography—which D. H. Lawrence called “the attempt to insult sex.”¹² Roman Catholic theologians would add artificial insemination from a third-party donor (“adultery”), divorce (“legal adultery”), and contraceptive birth control (“unnatural,” as with sodomy, bestiality, etc.). For general purposes of discussion, however, the laws affecting marriage, divorce, and annulment only *indirectly* regulate sexual acts, and we should focus here upon the acts which are directly regulated by law.

I

THINGS AS THEY ARE

The relativity and variety of sex laws, even within the common framework of “Christian civilization” in the West, may be seen when we compare the network of statutes in the United States and England to the French *Code pénal*, for the latter ignores entirely all sexual acts which are adult, private, and consensual.¹³ It should be carefully noted that the whole objective of recent studies and reviews of sex laws, such as the Model Penal Code proposals of the American Law Institute,¹⁴ is to encourage the adoption of legislative principles and statutory codes which approximate the *laissez-faire* code of France.

The Anglo-American policy has been a very confused and inconsistent one, tending to “dead letter” laws and hypocrisy. In England, law reformers find it something of a puzzle that adultery, fornication, and prostitution are not criminal offenses; nor is homosexuality between females an offense, although between males it is; nor was it until a scant fifty years ago that incest was made a crime.¹⁵ In the United States, with its fifty separate law-making states, there has been a veritable mare’s nest of statutory laws. Since Elizabethan and Jacobean times, for example, courts and legislatures have tended to follow Lord Coke’s line that homosexuality is “a detestable and abominable sin among Christians not to be named,”¹⁶ with the result that the statutes outlawing it are commonly so broadly and evasively worded as to make it difficult, if not impossible, to draw an indictment that allows the defense any bill of particulars. A quick reading of Ploscowe’s survey of the obscurities, contradictions, and loopholes of American law shows why he ended his

¹² D. H. LAWRENCE, *PORNOGRAPHY AND OBSCENITY* 13 (1930).

¹³ Adultery in certain circumstances, especially of the wife, is punishable; but it is punished as an offense against the marriage contract, not as a sexual act in itself.

¹⁴ MODEL PENAL CODE art. 207 (Tent. Draft No. 4, 1955; Tent. Draft No. 9, 1959).

¹⁵ British attitudes and policies, as reflected in its sex offender legislation, are treated more extensively elsewhere in this symposium. Hall Williams, *Sex Offender: The British Experience*, *infra* pp. 334-60.

¹⁶ See MORRIS PLOSCOWE, *SEX AND THE LAW* 151 (1951).

work declaring that the criminal law needs "a complete reorientation in the field of sex crimes."¹⁷

The logical difficulties are compounded by the moral evasions accompanying them. It has been seriously estimated that in the United States, there are about 40,000 sex crimes reported annually and perhaps ten to twenty times as many actually committed.¹⁸ Most state legislatures obviously do not regard their "sex crimes" as real crimes at all. For example, in Virginia¹⁹ and West Virginia,²⁰ only twenty dollars is the maximum penalty for fornication; in Rhode Island, it is only ten dollars.²¹ In Arizona, the penalty might be imprisonment for three years;²² but in North Dakota, it is only thirty days.²³ Police departments, except for Boston's, simply do not make arrests for adultery.²⁴ "Men and women copulate in sovereign disregard of penal statutes," and there is little that police, courts, or prosecutors can do about it unless we throw away the constitutional principle that safeguards privacy and frowns upon its invasion.²⁵

The hypocrisy of these laws is nothing new or "modern." It has revealed itself not only in the broad secular patterns of behavior, but also among such special and exemplary circles in the social order as the clergy. In medieval days, concubinage was common among the supposedly celibate priests, and the church authorities did not try to enforce the canons against it, even though they had the canons.²⁶ The Bishop of Winchester licensed prostitutes, or "stews," and collected the taxes on them; yet he forbade them the rites of the church and Christian burial on the ground that brothels were forbidden by "the law of God."²⁷ It is a comfort, as we shall see, to find that many distinguished churchmen are much less hypocritical in our own times.

There were, of course, other reasons than hypocrisy and venality for the failure of the ecclesiastical courts to deal effectively with forbidden sexuality, either heterosexual or homosexual. Their statutes, like many of the modern ones, were poorly drawn and defined, procedures were faulty as to evidence and judgment, and penalties were commonly meretricious. The penances imposed were so often commuted to money fines for the sake of the income that church courts lost status even where there was, as in England, a religious establishment with civil authority.

When the civil courts in England in 1533 took jurisdiction over sex sins and changed some formally into crimes,²⁸ they were far more punitive than the church courts had ever thought of being. For example, death was made the penalty for

¹⁷ *Id.* at 281.

¹⁸ JOHN MCPARTLAND, *SEX IN OUR CHANGING WORLD* 145 (1947).

¹⁹ VA. CODE ANN. § 18.82 (Cum. Supp. 1959).

²⁰ W. VA. CODE ANN. § 6058 (1955).

²¹ R.I. GEN. LAWS ANN. § 11-6-3 (1956).

²² ARIZ. REV. STAT. ANN. § 13-222 (1956).

²³ N.D. REV. CODE § 12-2208 (1943).

²⁴ MORRIS PLOSCOWE, *SEX AND THE LAW* 157 (1951).

²⁵ *Id.* at 281.

²⁶ H. C. LEA, *HISTORY OF SACERDOTAL CELIBACY IN THE CHRISTIAN CHURCH* 244, 260 *et seq.*, 445 *et seq.* (1932).

²⁷ GEOFFREY MAY, *SOCIAL CONTROL AND SEX EXPRESSION* 105 (1930).

²⁸ 25 Hen. 8, c. 6 (1953).

male homosexual acts (ignoring "lesbian" behavior altogether); and it was not until 1828 that this was reduced to life imprisonment, to be reduced again, with typical gyration, in 1885 to a maximum of two years!²⁹ Penalties in the United States range from one day in New York³⁰ to life imprisonment in Nevada;³¹ some states have a five-year maximum,³² others a five-year minimum.³³ It seems fairly evident that the common-law courts have never managed to work out a comprehensive or coherent code of forbidden sexual acts. Following a precedent of harshness by the early Puritans, some states have gone very far; for example, an Indiana statute actually made self-masturbation an offense punishable on the same terms provided for sodomy.³⁴

Prostitution might serve as another example, although not as much of confusion as of evasion. The "call girl" phenomenon in America today is simply a sophistication of the older practice. Christian culture has always been two-sided about prostitution—unfairly condemning prostitutes, while winking at or even justifying toleration of prostitution as a necessary evil.³⁵ St. Thomas Aquinas reasoned that God allows it "lest certain goods be lost or certain greater evils be incurred."³⁶ In the United States, it is a criminal offense in all states, defined as the indiscriminate offer of sexual intercourse for hire; but in England, it is not in itself an offense, although certainly the law there prohibits certain features that commonly attend it, such as street and public solicitation.

And so with other statutory offenses. Similar varieties, duplications, contradictions, inequalities, and lacunae are to be found on other scores of sexual behavior. To correct the trouble, we have a swelling stream of suggestions. Glanville Williams urges, for example, that bigamy should not be an offense, since it is actionable already as a fraudulent obtaining of intercourse and a deliberate registering of a void marriage.³⁷ In the same way, it has been argued that bestiality can be left to the general provisions covering cruelty to animals, and that incest be dropped as a statutory offense and reliance made upon existing laws on family relations, mistreatment, and assaults on children—as in Belgium.³⁸ The range and complexity of sex laws at present "on the books" is a monument to tongue-in-the-cheek legislation and to the "prohibitionist fallacy."

²⁹ Offenses Against the Person Act, 1828, 9 Geo. 4, c. 31, § 1, as amended, Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69, § 11.

³⁰ N.Y. PEN. LAW § 690.

³¹ NEV. REV. STAT. § 201.190 (Supp. 1958).

³² KY. REV. STAT. § 436.050 (Supp. 1955); LA. REV. STAT. § 14: 89 (1950); N.H. REV. STAT. § 579.9 (1955); S.C. CODE § 16-412 (1952); WIS. STAT. § 944.17 (1957).

³³ ARIZ. REV. STAT. ANN. § 13-651 (1956); IDAHO CODE ANN. § 18-6605 (1948); MONT. REV. CODES ANN. § 94-4118 (1947); N.C. GEN. STAT. § 14-177 (1943); S.C. CODE § 16-412 (1952); TENN. CODE ANN. § 39-707 (1956).

³⁴ Ind. Acts 1905, ch. 169, § 473, at 584.

³⁵ ST. AUGUSTINE, DE ORDINE II. iv (12).

³⁶ ST. THOMAS AQUINAS, SUMMA THEOLOGICA II-II, Q.X, 11.

³⁷ Williams, *supra* note 8, at 224.

³⁸ *Id.* at 197.

II

THE MORAL QUESTION POSED

The conclusion that "the American sex revolution" has trapped us in a "listless drift towards sex anarchy"³⁹ is no doubt overdrawn. Still, there has been a change in sex attitudes and practices of a truly revolutionary caliber; this is a patent truth accepted generally among present-day culture analysts. Perhaps a typical symptom can be seen in the recent furor within British Medical Association circles over a booklet, *Getting Married*, by Eustace Chessier, M.D., and Winifred de Kok, M.D. It was written and published by the BMA, but had to be withdrawn after some members resigned in protest shortly before the first printing was exhausted. As an American commentator at the University of Oklahoma expresses it, the protestants disavowed the booklet's claim that chastity is "outmoded and should no longer be taught young people."⁴⁰ Nevertheless, the fact that it could reach the advanced stage of publication and discussion it did is significant.

Parallels and cross-cultural traits as between England and America are a commonplace. Transatlantic attitudes and customs have always maintained a marked degree of similarity, in spite of typically chauvinist disclaimers in the journalism of both countries. Therefore, it is important, even vital, to keep abreast of British developments as we carry on our American discussion of sex ethics and sex law. We have a significant development of this kind in the proposals of a recent parliamentary committee chaired by Sir John Wolfenden,⁴¹ and in the testimony formally submitted to it by the Church of England Moral Welfare Council.⁴² These studies are as appropriate to our own American legal and ethical problems as to Great Britain's. Proposals in the American Law Institute lean heavily in the direction of the English ones, but by comparison, they seem to lack the sharp edge and clarity we need to reach and explore the issues at stake. Perhaps the most succinct statement of the core issue as between ethics and sex laws is one in the testimony of the Anglican Council. It declared that⁴³

it is not the function of the State and the law to constitute themselves guardians of *private* morality, and thus to deal with *sin as such* belongs to the province of the church. On the other hand, it is the duty of the State to punish crimes, and it may properly take cognizance of, and define as criminal, those sins which also constitute offenses against *public* morality

The heart of the ethical question, for lawmakers and enforcers, is precisely this distinction between public and private interests, between illegality and immorality, between crime and sin. The Anglican Council, which is not an official agency, even though it carries great weight, "unreservedly" condemned as "sinful" all violations

³⁹ PITIRIM A. SOROKIN, *THE AMERICAN SEX REVOLUTION* 131 (1956).

⁴⁰ Dersch, *Chastity Is Not Outmoded*, 18 *CHILD-FAMILY DIG.* 3, 5 (1959).

⁴¹ Committee on Homosexual Offenses and Prostitution, *Report*, CMND. No. 247 (1957) [hereinafter cited as CMND. No. 247].

⁴² D. S. BAILEY (ED.), *SEXUAL OFFENDERS AND SOCIAL PUNISHMENT* (1956).

⁴³ *Id.* at 38.

of Christian teaching on chastity. Yet, it insisted that "there should be no departure in specific instances from the generally accepted principle that the British law does not concern itself with the private irregular or immoral sexual relationships of consenting men and women," and that "the action of the State should be therefore limited to the protection of the citizen from annoyance or obstruction."⁴⁴

We have here two legally relevant distinctions. One is the distinction between immoral and illegal offenses; the other is the distinction between private and public acts. The laissez-faire nature of this approach is self-evident. Thus, Eustace Chesser has called these distinctions the moral of the Wolfenden Report, which followed the line proposed by the Anglican Council.⁴⁵ The Anglican Council and the Royal Committee, on this common basis, called for a radical minimization of statutory laws controlling and penalizing both heterosexual and homosexual activities, whether in prostitution or in noncommercial relationships.

The fact is that recent tentative drafts of the Model Penal Code for the American Law Institute are very similarly inclined. Published private opinions, too, are increasingly of the same kind. To give one example, Albert Ellis, a psychiatrist, has published views that have much popular support (outside of legislative halls) and a wide reading, even though the almost truculent hedonism he espouses would generally be repudiated.⁴⁶ In his basic ethical norms, he is poles apart from the Anglican Council, since he gives his approval to any and every kind of sexuality, but his viewpoint parallels the Council's as far as the law is concerned. He insists that⁴⁷

society should not legislate or invoke social sanctions against sex acts performed by individuals who are reasonably competent and well-educated adults; who use no force or duress in the course of their sexual relations; who do not, without the consent of their partners, specifically injure these partners; and who participate in their sex activities privately, out of sight and sound of unwilling observers. If this and only this kind of limitation were applied in modern communities, only a few distinct sex acts would be considered illegal and illegitimate. Included would be seduction of a minor by an adult; rape, sexual assault and murder; and exhibitionism or forms of public display.

In connection with its proposal to remove homosexuality from the list of proscribed acts in the criminal law, the Royal Committee, like the Anglican Council, held:⁴⁸

Unless a deliberate attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality.

⁴⁴ *Id.* at 17, 62.

⁴⁵ EUSTACE CHESSE, *LIVE AND LET LIVE* (1958).

⁴⁶ ALBERT ELLIS, *SEX WITHOUT GUILT* (1958). Complete promiscuity (short of coercion) is also defended by RENE GUYON, *THE ETHICS OF SEXUAL ACTS* (1934); NORMAN HAIRE, *HYMEN OR THE FUTURE OF MARRIAGE* (1928).

⁴⁷ ELLIS, *op. cit.* *supra* note 46, at 190.

⁴⁸ CMND. No. 247, para. 61.

The core consideration here is the separation of public and private morality. There is no suggestion that what is private or nonpublic is not subject to moral judgment, or that what is done in secret is ipso facto righteous. In developing its appeal for clarification of the circumstances that might make prostitution illegal, the Wolfenden Report simply said:⁴⁹

It should not be the duty of the law to concern itself with immorality as such . . . it should confine itself to those activities which offend against public order and decency or expose the ordinary citizens to what is offensive or injurious.

In our common-law tradition, a premium has always been put on privacy; the law has frowned upon its invasion. Police and citizens alike are forbidden to trespass. No general right of search is provided. The principle is that "an Englishman's home is his castle," and consequently wire tapping, interference with mail, or any other such maneuver is subject to close scrutiny by the courts. The public-private distinction has some legal history. And besides, there has always been a real respect for ethical pluralism and for private convictions in our liberal inheritance, as well as for private *actions*. As an American Law Institute report expresses it, "to use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions."⁵⁰

These two distinctions, then, between morality and legality (sin and crime), and between public and private interests, set the major terms of the problem of sex laws in relation to social ethics.

III

AN ETHICAL ANALYSIS

A. Morality and Legality

The old crackerbarrel phrase is, "You cannot legislate morals." Experience with our sex laws, as with the "noble experiment" of prohibition in the 'twenties, seems to show that the ethical standards after which we aspire cannot be imposed by force of law. It has occasionally been argued that law encourages and inculcates higher standards of behavior and that the proper role of positive law is not merely to reflect the consensus of the society enacting it, but to anticipate and pioneer it. But this doctrine has little prospect of being adopted in democracies. A more cautious view might hold that law can inhibit as well as prohibit behavior, operating as "a conditioner of conduct," but even this is questionable.⁵¹ And the opposite can be true; Westermarck refers to a homosexual who said "he would be sorry to see the English law changed, as the practice would then lose its charm."⁵²

Law certainly does not seem to be edifying in its moral influence, even if

⁴⁹ *Id.* para. 257.

⁵⁰ MODEL PENAL CODE § 207.11, comment at 151 (Tent. Draft. No. 9, 1959).

⁵¹ Cf. Frey, *Freedom of Residence in Illinois*, Chicago Bar Record, Oct. 1959, p. 4.

⁵² E. WESTERMARCK, *CHRISTIANITY AND MORALS* 374 (1939). Cf. HAVELOCK ELLIS, *SEX IN RELATION TO SOCIETY* 207 (1937).

it is though to be a restraint on one or more levels. Ethical analysis of law reveals that its real function is to *limit* obligation. Law says, "This specifically (*i.e.*, *only* this) you are to do, or to refrain from doing." Law's definition of obligation is inherently a limitation of obligation. It does not—it cannot—prescribe ideals or even an optimum discipline. This is precisely the reason for St. Paul's revolt from code law (Torah) and the rise of the term "pharisaism" to describe the practice of hiding behind the law to evade the unbounded demands of grace (an evasion as common in Christian as in Jewish conduct). The radical Christian love-ethic is so grace-focused that its own built-in danger is a tendency to ignore our need of law to make sure that justice is served in a world of still-selfish rather than neighbor-concerned citizens.

The Wolfenden Report and Anglican Council testimony favored the elimination of most of our existing sex statutes for these two reasons: first, law does not build character; and second, it tends to stunt the sense of moral obligation and provide defenses for the complacent. In the same spirit, the American Law Institute has allowed that the criminal law on sex offenses "cannot undertake or pretend to draw the line where religion and morals would draw it."⁵³

There is a third reason for separating sin, or moral fault, from crime, and that is that compelled (law-enforced) behavior is not righteous behavior anyway. No merit, or moral credit, accrues to obedience under the *imperium* of positive law. Only voluntary obedience, under the *auctoritas* of the moral law, represents ethical achievement. Sir George Frazer once suggested that it is better for men to do the right thing for a wrong reason than the wrong thing for a right reason.⁵⁴ He was speaking of the role of superstition; but whether the reason is superstitious or legalistic, it is a dubious principle to follow. The only possible ground for *compelling* people to do "the right thing" is concern for justice. We cannot permit innocent third parties to be victimized by the exercise of such high principles as personal freedom and responsibility, desirable as they are, if in some situations, freedom from law means that those who enjoy that freedom exercise it to the injury of others. It was for this reason that the Anglican Council, when recommending freedom (*legal* freedom) for sexual promiscuity, added the condition that it must be adult, consensual, and not a public nuisance.

There is still another related consideration. Most of our sex statutes do not take adequate account of the element of psychological compulsion. Modern depth psychology has revealed the wide extent to which many sexual acts, hetero and homosexual, are compulsive. Both civil law and ethical analysis make it a principle (*mens rea*) that an act must be *internally* free to be blameworthy, as well as *externally* free to be praiseworthy. The compulsive are not culpable, and this rule applies to many sex crimes. Hence the maxim: *actus non facit malum nisi mens sit rea*—an act is not criminal unless the mind is guilty. The courts have said, "Our collective conscience does not allow punishment where it cannot impose blame."⁵⁵

⁵³ MODEL PENAL CODE § 207.11, comment at 150 (Tent. Draft. No. 9, 1959).

⁵⁴ GEORGE FRAZER, *MAN, GOD AND IMMORTALITY* 191-92 (1927).

⁵⁵ *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945).

We have passed beyond the appeal of the Gilbert and Sullivan song, "let the punishment fit the crime," to the insight that the punishment should fit the criminal as well. In the effort to establish a new rule that some sins are not crimes, we must remember the reverse proposition too: some crimes are not sins.

In pleading for the separation of sins and crimes, this article asserts quite simply that it is not the business of law to punish sin at all. It is the business of law to prevent or punish wilful injuries to individuals or to the common order. There is no idea here that ethics, whether religious or not, is to be separated from society and social practice; on the contrary, ethics always limit individual or private freedom by subordinating it to the social or public interest—to neighbor-concern. Nor is the separation of sin and crime a matter of any one orientation or philosophy. Both religious and nonreligious moralists could oppose criminal actions against sexual wrongdoing, holding such actions to be the wrong remedy. Thus, the present Archbishop of Canterbury, Geoffrey Fisher, says of nonprostitutional homosexuality, "Some of us think that this particular evil could be more effectively dealt with pastorally if it were not regarded as criminal."⁵⁶ At the same time, he favors putting both adultery and prostitution on the statute list as, in his view, inherently injurious to other individuals and/or the collective good. (Even more controversially, he holds that artificial insemination from a donor is adultery and should be proscribed. This is the papal position, too.)

In brief, it seems axiomatic that the law cannot rely upon a doctrine that its citizens are legally entitled to disbelieve. There are some ethical doctrines that do not render an adverse judgment (*moral* judgment) upon many sexual acts commonly held to be crimes or sins or both. For example, ethical standards based on natural-law theories, as in Roman Catholicism, or on scriptural-law rules, as in Protestant literalism and fundamentalism, are *not* the standards of humanists, naturalists, and others. They have not, in fact, been acceptable even in the law for a long time—especially in the American positive-law tradition. Sin is already divorced from crime in our pluralistic culture, and the only real sanction for criminal law is *the common interest*, public order, or the collective good. On this basis only may an ideologically free and pluralistic society frame its moral principles or judgments as to right and wrong and enforce its standards by legal weapons. Society has a right to *protect* itself from dangers within and without, but not to enforce a monistic and monopoly standard of personal (in the sense of private) conduct. The question is: What, if anything, is discretely private? This leads us on to the second crucial distinction.

B. Privacy and Community

Ethically regarded, the distinctions between private and public moral standards and conduct would be irrelevant and even meaningless in societies in which cultural

⁵⁶ Time, Nov. 30, 1959, p. 44. The Earl of Winterton has remarked that if the Archbishop's wish to outlaw adultery were realized, a good many members of the House of Lords would have to go to prison. *Id.*, Jan. 4, 1960, p. 23.

monism obtained—*i.e.*, in societies that had a single, monopolistic faith or philosophy. Such was the case in the era of church establishment, for example, when the state was the secular arm of the church. But that kind of uniformity (as distinguished from unity) has suffered Queen Anne's fate; it is dead, and its resurrection seems, at least, a highly eschatological hope. For some of us, it seems far better, anyway, that there should be a diversity of religions and philosophies and political doctrines. For out of their rubbing together, their competition in the free market of ideas, truths and insights are revealed that would not have emerged in a monochrome culture. Many colors are needed in the democratic coat.

This belief that variety provides creativity, uniformity yields only conformity, is not held by all. At the political level, communists and many anticommunists strive for a one-party state. At the religious level, many Christians and Jews long for a one-faith, one-morality order. For example, Roman Catholic moralists often claim that "truth has rights which error may not enjoy."⁵⁷ They have defended their wish to outlaw contraceptive birth control on the ground that it is a practice that violates the natural law (what St. Thomas Aquinas called a *vitium contra naturam*) and further claim that the natural law is binding on *all* people, Roman Catholics and others alike.⁵⁸ The obvious difficulty with this doctrine is that it relies upon the *magisterium* of the church hierarchy to decide which moral judgments are correctly adduced from nature and which ones are not. It is clearly not a matter of *consensus communis* and, therefore, incommensurate with democratic principles. Although careful democrats will not claim that "the voice of the people is the voice of God," they are not likely, for the same reasons, to acknowledge that any ecclesiastical party is either. This is clearly, and persuasively, the reason why legal positivism has triumphed in American law and jurisprudence, rather than natural-law doctrines. As Lon Fuller has pointed out in his discussion of these "two competing directions of legal thought," positive law is skeptical about any attempt to bridge "Hume's gap" between what is and what ought to be, whereas natural-law theory does so confidently.⁵⁹

Our American tradition is, therefore, pragmatic and utilitarian, not metaphysical and dogmatic. We cannot be otherwise in the face of different and conflicting schools of natural-law morality and law, deriving their norms and criteria from such various sources as the nature of God, or the nature of man, or the nature of things. The same position would hold in relation to Kant's categorical imperatives of practical reason—as, for example, his conclusion deduced from the principle of requital (*jus talionis*) that those who engage in an act of bestiality should be expelled from society and deprived of human rights.⁶⁰

⁵⁷ F. J. BOLAND & J. A. RYAN, *CATHOLIC PRINCIPLES OF POLITICS* 169 (1940).

⁵⁸ See, e.g., O'Brien, *Why Do Catholics Oppose Artificial Birth Control?*, *Our Sunday Visitor*, June 15, 1958.

⁵⁹ LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 4-6 (1940).

⁶⁰ Cf. WESTERMARCK, *op. cit. supra* note 52, at 378.

Again, then, there is no just and realistic way in law to take account of the pluralistic situation, except by distinguishing between private and public standards. There is no ambiguity here, but there is an ambivalence. Wiley Rutledge once said, "I believe in law. At the same time I believe in freedom. And I know that each of these things may destroy the other. But I know too that, without both, neither can long endure."⁶¹ He referred to the neat balance we must maintain between the *areas* of private choice and public policy. Only by means of distinguishing private and public (preserving privacy and responsibility, and protecting the public order for the sake of justice) can we give life to the truth that freedom and order presuppose each other. On the one hand are the moralists who covet the widest possible range of freedom according to conscience; on the other is the equally imperative obligation of the lawmakers and courts to fulfill what Holmes called their "duty of weighing considerations of social advantage," which is the "very ground and foundation of [legal] judgments."⁶² Freedom without control by law—*i.e.*, without concern for the collective interest and protection of the innocent—invites disaster either in the form of anarchy or dictatorship.⁶³

This pragmatic distinction is already partially recognized in the law and the courts. It is sufficiently illustrated in a Missouri case where the appellate court reversed a conviction for adultery on the ground that the appellants had not been guilty, according to the act, of *open and notorious* cohabitation. "It is not," said the court, "the object of the statute to establish a censorship over the morals of the people, nor to forbid the violation of the seventh commandment. Its prohibitions do not extend to stolen waters nor to bread eaten in secret."⁶⁴ Here is the operation of the principle imbedded in the Wolfenden Report and the Anglican Council's recommendation. In the same way, the American Law Institute's latest draft proposal extends the legal grounds for abortion from the present restriction to therapeutic reasons only, to include the mental and physical health of the mother, to prevent physical or mental defects in the child, and to end pregnancies after rape and incest. Soon, we may be sure, statutory rape will be added. The Institute's discussion has also referred to further possible grounds such as pregnancy in a deserted wife, a working mother having to support a dependent husband and children, a prison inmate or other institutionalized person, or an unmarried woman who could not rear her child. Says the draft commentary, "the weight of critical and public opinion probably favors much more restricted applications of criminal sanctions than present laws contemplate."⁶⁵

But *can* sex conduct be a private matter? In terms of ultimate meaning, the probable answer is "No." As Edmond Cahn has expressed it, although each of us

⁶¹ WILEY B. RUTLEDGE, A DECLARATION OF LEGAL FAITH 6 (1947).

⁶² Holmes, *The Path of Law*, 10 HARV. L. REV. 456, 467 (1897).

⁶³ Cf. BRUNO BETTELHEIM, LOVE IS NOT ENOUGH *passim* (1950).

⁶⁴ State v. Chandler, 132 Mo. 155, 164, 33 S.W. 797, 799 (1896).

⁶⁵ MODEL PENAL CODE § 207.11, comment at 149 (Tent. Draft. No. 9, 1959). But cf. Tinnelly, *Abortion and Penal Law*, 5 CATHOLIC LAW. 187 (1959).

has our own unique being and integrity, yet "each human being is also a cell in the social organism and in the complex tissue of its members, operating always as a socius with others, never through himself alone."⁶⁶ In the same vein, Archbishop Temple said, "Personality is inherently social. We can only become fully personal through the interaction of our own and other selves in the fellowship of society"—there are no "hard, atomic cores of individuality."⁶⁷ Nevertheless, in opposing a merely monadic view of people, we must avoid a false solidarism or collectivist view. There is *some* boundary between personal existence and the social membership. There is some range for private choice and personal taste.

Sylvanus Duvall, whose ethical analysis of sex conduct is far from puritanical or doctrinaire, has concluded that the greatest danger in our day is a kind of antinomian selfishness about sex. "Nobody," he says, "frankly repudiates the whole idea of morality and defends his position in a logically organized statement."⁶⁸ But he thinks a-moralism lurks behind much of the discussion, like a weasel in the hen-house. "The non-moral are those who . . . recognize no obligation beyond their own wishes and desires except those dictated by prudence."⁶⁹ All such autonomies, whether they be sex for sex's sake, or business, or art, or science, or even "America First," are the sworn enemies of law with its concern for the common good.

The English jurist Sir Patrick Devlin said in opposition to the Wolfenden Report that "it is wrong to talk of private morality" and "the suppression of vice is as much the law's business as the suppression of subversive activities."⁷⁰ But this appears to be a position based on a radically solidaristic view of community and personality, and perhaps it predicates the natural-law theory of universals. It is entirely tenable, however, to hold that any sexual act that seems directly or indirectly to affect the public interest adversely, either through its overt consequences, such as illegitimacy, or its remote consequences, such as the influence of its example, may be statutorily forbidden. Since it would hurt the public interest, it is a matter for the law. This would not be taking the line that we cannot distinguish between private and public affairs. It would be up to the consensus, expressed through democratic lawmaking channels, to determine the issue in each form of sexuality.

CONCLUSION

Ethics and moral philosophy are concerned with character on the practical side, as well as with a critical analysis on the theoretical side. It is doubtful whether sex laws can build character (raise sights), and it is even probable that unenforced and/or unenforceable laws, through the attendant hypocrisy or outwit-the-cops spirit, actually weaken character and standards. Modern medicine and its technology have

⁶⁶ EDMOND CAHN, *THE SENSE OF INJUSTICE* 31 (1949).

⁶⁷ WILLIAM TEMPLE, *THEOLOGY* 8, 17 (1936).

⁶⁸ This is not quite true any longer. One well-known psychiatrist was quoted as saying, "No human being should ever be blamed for anything he does." *Time*, Sept. 14, 1959, p. 69. This presumably entails a "no praise" clause also. It repudiates ethical judgment altogether.

⁶⁹ SYLVANUS DUVALL, *MEN, WOMEN, AND MORALS* 285 (1952).

⁷⁰ PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 15 (1959).

brought about a revolution. Lippmann has caught it in a phrase: contraception and other means of control have provided a sexual freedom that is a "transvaluation of values" in sex ethics.⁷¹ This revolution has removed from sex conduct the triple terrors of conception, detection, and infection. Sex is safe. From now on, it will be personal conviction, not fear, that will hold people to chaste standards if they are to be preserved.⁷²

Looking at the relation of ethics to law in general, we may assert four propositions.

1. Value (*i.e.*, moral) considerations enter into lawmaking.
2. Law should be the means of making social morality effective.
3. The prelegal, value-finding process lies in the consensus of the community as to the common welfare.
4. What is held to be private, in the consensus, is not the law's business.

As to sex laws in particular, offenses should be restricted to (a) acts with persons under the legal age of consent; (b) acts in situations judged to be a public nuisance or infringement of public decency; and (c) acts involving assault, violence, duress, or fraud.

⁷¹ LIPPMANN, *op. cit.* *supra* note 5, at 291.

⁷² Cf. Fletcher, *A Twentieth Century Philosophy of Sex*, Ladies Home Journal, March, 1959, p. 48.

SEX OFFENSES: A SOCIOLOGICAL CRITIQUE

STANTON WHEELER*

INTRODUCTION

Issues raised by sex offender legislation cut across a number of problems that are of interest to law, psychiatry, and the social sciences. Three problems are selected for brief review in this paper. The first concerns the basis for deciding what types of sex relationships should be subject to legal restraint. Second, the paper will review objective evidence regarding social attitudes toward various forms of sex conduct between consenting partners. Problems posed by more serious sex offenders will be examined in the closing section, with special attention directed to sex psychopath statutes and to possible sociogenic factors in the development of sex offenders. For reasons of space, the special problems posed by prostitution are not considered. Since other contributions to this symposium deal with experience in other societies and with the special problems of juveniles, the concern in this article is limited primarily to social norms and laws relevant to adult sexual relationships in the United States.

I

PROBLEMS IN THE DEFINITION OF SEX OFFENSES¹

A. Sex Relationships Subject to Legal Restraint

Most of our sex laws are designed to govern one or more of four aspects of sexual relationships. Strongest legal sanctions are directed to control of the *degree of consent* in the relationship, with many states allowing the death penalty for forcible rape. Other bodies of sex law place limits on the *nature of the object*. Currently, most states restrict legitimate objects to humans, of the opposite sex, of roughly the same age, and of a certain social distance in kinship terms. Thus, sodomy or bestiality statutes prohibit relations with animals, parts of the sodomy statutes prohibit relations with members of the same sex, statutory rape and indecent liberties or child-molestation statutes restrict the legitimate age range of the partner, and incest statutes prohibit relationships with relatives other than the spouse. In addition, many jurisdictions, through fornication and adultery laws, limit legitimate objects to marriage partners. Legal restrictions

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¹ Statutes defining sex offenses have been reviewed in a number of publications and will not be discussed in detail here. Major sources on which this discussion is based include ROBERT V. SHERWIN, *SEX AND THE STATUTORY LAW* (1949); MORRIS PLOSCOWE, *SEX AND THE LAW* (1951); BENSING, *A Comparative Study of American Sex Statutes*, 42 J. CRIM. L. & P.S. 57 (1951). See also Ploscowe, *Sex Offenses: The American Legal Context*, *supra* pp. 217-24.

are also placed on the *nature of the sexual act*. Full legitimacy is restricted largely to acts of heterosexual intercourse. Even if the object is a legitimate sexual object, the act may be subject to severe legal sanction. Thus oral-genital contacts, digital manipulation, and common-law sodomy are legally deviant acts, although they may occur by consent between a married pair. Finally, the law attempts to control the *setting in which the act occurs*. Relationships that are otherwise subject to no restraints may become so when they occur publicly or when carried on in such a manner that the public may easily be aware of the relationship. States that do not punish single or even repetitive acts of fornication or adultery may do so if there is evidence of "notorious" show of public indecency. Public solicitation statutes as well as indecent exposure laws are likewise oriented to control of the setting, rather than the act itself.

B. Aims of the Criminal Law

If there were an explicit and articulate rationale underlying the criminal law's attempts to control sex conduct, one might expect that the legal sanctions attached to the various relationships would show an orderly pattern. That nothing could be further from the case is a frequently-noted and often-condemned fact.² The wide disparity in definitions of sex offenses and in severity of sanctions reflects, in part, the differential judgment of the seriousness of all sex offenses. In addition, it reflects differing judgments of the *relative* seriousness of differing types of sex relationships. Some understanding of the sources of disparity emerges from consideration of the various and conflicting aims of the criminal law as it applies to sex offenses.

A traditional emphasis views the criminal law as reflecting the moral condemnation of the community. Emile Durkheim's discussion of the universal elements in crime stressed the feature of moral condemnation. Crimes "shock sentiments which, for a given social system, are found in all healthy consciences."³ Crimes consist "in acts universally disapproved of by members of each society."⁴ The image of a homogeneous community reacting through the collective conscience was forcefully presented as the characteristic reaction to crime. A vigorous statement of a similar position has recently been made from a legalistic perspective. Henry M. Hart has defined crime as "conduct which, if duly shown to have taken place, will incur the formal and solemn pronouncement of the moral condemnation of the community."⁵ He has voiced the fear that this element may be lost in sentencing procedure, even if retained in the definition of crime, if corrective and rehabilitative emphases predominate.

The element of moral condemnation in sex laws is vividly portrayed in statutes

² MORRIS PLOSCOWE, *SEX AND THE LAW* 136-55 (1951).

³ EMILE DURKHEIM, *ON THE DIVISION OF LABOR IN SOCIETY* 73 (George Simpson transl. 1933).

⁴ *Ibid.*

⁵ Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROB.* 401, 405 (1958). Hart also has emphasized the obligations imposed by community life, although these obligations are only indirectly caught up in his formal definition. See *id.* at 413, 426.

defining "crimes against nature." The very use of such a vague and ill-defined concept is related to the revolting nature of the behavior. Ploscowe has noted a judge's ruling in such a case:⁶

It was never the practice to describe the particular manner of the details of the commission of the crime, but the offense was treated in the indictment as the abominable crime not fit to be named among Christians. The existence of such an offense is a disgrace to human nature. The legislature has not seen fit to define it further than by the general term, and the records of the courts need not be defiled with the details of the different acts which may go to constitute it. A statement of the offense in the language of the statute is all that is required.

A different basis for the definition and grading of crimes is reflected in the conception that the criminal law should punish only those acts that are socially dangerous, independent of their moral character. The American Law Institute's Model Penal Code⁷ and the Wolfenden Report⁸ in England have been strongly influenced by this conception in the drafting of recommendations regarding sex offender laws. In recommending the restriction of the crime of fornication to open and notorious acts and those involving adoptive parents and children, the draftsmen of the Model Penal Code justify their position as follows:⁹

The code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the action.

Throughout the discussion of code provisions, emphasis is clearly placed on control of behavior that appears to show some immediate social harm, either through the use of violence, through the exploitation of children, or through the nuisance value of public indecency.

The Wolfenden Report reflects a similar concern. It has been noted that "the yardstick applied throughout was utilitarian. If it could be proved that the behavior of an individual was socially injurious, he or she must be restrained."¹⁰ Sex offenses are to be distinguished from sins and controlled in accordance with their objective social danger, rather than the degree of moral arousal they bring about.

A third criterion for the establishment of sex legislation has emerged during the past two decades. It is part of the growing influence of rehabilitative concerns on the administration of criminal law. This criterion reflects neither the moral condemnation nor the social danger of the offense; rather, the stress is on the degree of psychopathology characterizing the offender. The influence of this conception has been extended from sentencing and treatment considerations to the definition of antisocial acts. Some of the sex psychopath statutes have allowed commitment up to life for persons showing such characteristics as "emotional instability, impulsive-

⁶ MORRIS PLOSCOWE, *SEX AND THE LAW* 197 (1951).

⁷ MODEL PENAL CODE art. 207 (Tent. Draft. No. 4, 1955; Tent. Draft No. 9, 1959).

⁸ COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, *REPORT*, CMND No. 247 (1957).

⁹ MODEL PENAL CODE § 207.1, comment at 207 (Tent. Draft No. 4, 1955).

¹⁰ EUSTACE CRESSER, *LIVE AND LET LIVE* 116 (1958).

ness, lack of good judgment, failure to see consequences of act, irresponsibility in sex matters"¹¹ Clearly, the emphasis is on personal qualities of the offender, rather than on the seriousness of any particular act.

Finally, there is increasing recognition of the important practical criterion of enforceability. The lack of visibility of most forms of sexual relations between consenting partners means that detection and arrest are nearly impossible for the vast number of cases. Such lack of enforceability may become another basis for judgment of selection of legal sanctions. Practical problems of enforcement are reflected in Model Penal Code recommendations concerning adultery and in discussion of the possible withdrawal of penal sanctions for deviate sexual intercourse between consenting adults.¹²

Current sex statutes reflect these varying aims of the criminal law. They do not fit a single dimension of social evaluation, but instead catch up in differing degrees the aims of expressing a) the community's sense of moral condemnation or revulsion; b) the degree of social harm resultant from the act; c) the degree of psychopathology characterizing the offender; or d) by omission, the practical problem of enforcement. Thus, it is no surprise that our sex laws are inconsistent and contradictory. A consistent criminal code for sex offenders is unlikely to emerge until there is agreement on the fundamental aims of the criminal law in this area.

C. Trends and Problems

The Model Penal Code and the Wolfenden Report give evidence of a movement toward a consistent framework for the criminal law regarding sex offenses. As noted, this framework places the social-danger criterion at the apex of the aims of the criminal law, assigns a lesser but important role to the aim of enforceability, and restricts the expression of the moral condemnation of the community to such cases as are also viewed as socially dangerous. This shift away from a moral emphasis presents some problems that deserve brief mention.

A chief difficulty in implementing a criterion of moral condemnation lies in the diversity of moral sentiment in modern communities. Durkheim's conception of a universal response to deviance was perhaps overdrawn, even for primitive communities. It seems particularly unrealistic in application to contemporary western societies. The very changes that were indexed by the growth of restitutive law have brought about also a change in the collective response to criminals. Increasing social differentiation makes it difficult to find acts that are universally condemned. To speak of moral condemnation of *the community* is to use the term community in a very loose sense. It may apply to certain acts of violence and to crimes against children. Beyond these areas are many actions where no single community opinion can be said to exist. Responses to gambling laws, to white-collar violations, or to

¹¹ From a 1949 Indiana statute, as described in CALIFORNIA DEP'T OF MENTAL HYGIENE, FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH 45 (1954).

¹² MODEL PENAL CODE 277-78 (Tent. Draft. No. 4, 1955).

sex offenses between consenting partners depend heavily on the cultural background of the offender or of the person making the judgment. These influences play upon processes of adjudication and help to produce the great disparity in sentencing policies in different jurisdictions. Thus, the conception of a homogeneous community response, as implied by the moral condemnation argument, fails to square with contemporary life.¹³

In the face of these problems, the aim of limiting criminal sanctions to socially dangerous acts has great appeal. It purports to avoid the problem of differing moral judgments by establishing an objective standard of social danger; if acts surpass a certain minimal level, they are to be defined as crimes and graded as to severity according to the degree of danger involved.

The difficulties in working out such a formulation are evident in parliamentary response to the Wolfenden Report recommendations on homosexuality. There appeared to be general acceptance of the argument that conduct not injurious to society falls outside the legitimate concerns of the criminal law. But members of the House of Commons were uncertain that homosexuality between consenting adults was not injurious. There was fear that others might easily be corrupted if the act is not criminal—that persons will be willing to experiment with homosexual relations.¹⁴ There was also the fear that removing the legal sanctions might imply condonation of homosexuality.¹⁵

Thus, even though there is no clear and present danger of bodily harm or corruption of morals in acts between consenting adults, there is always the possibility of long-term harmful consequences. Arguments to this effect can always be made and are hard to refute on empirical grounds, especially where the effects, if any, are likely to be subtle and only shown over a long time span. Although the history of legal control of sex conduct is largely one of failure,¹⁶ this fact is a commentary on the problem of enforceability of the law; it does not, of itself, establish anything about the degree of social danger of the conduct. It is always possible to argue, as members of Parliament did, that conditions could be worse were the laws not on the books.¹⁷

¹³ Cf. Fuller, *Morals and the Criminal Law*, 32 J. CRIM. L. & C. 624 (1942). Evidence on variation in sentences comes from a variety of sources and is summarized in Glueck, *Predictive Devices and the Individualization of Justice*, 23 LAW & CONTEMP. PROB. 463 (1958).

¹⁴ Murray, *Commons Debate on the Wolfenden Report*, 122 JUST. P. 816 (1958).

¹⁵ *Wolfenden Report in Parliament*, 1959 CRIM. L. REV. (ENG.) 38. The recommendations of the Wolfenden Committee are discussed in greater detail elsewhere in this symposium. Hall Williams, *Sex Offenses: The British Experience*, *infra* pp. 334-60.

¹⁶ All authorities are in agreement on the failures of legal controls, and the evidence is well known. Most states have almost no prosecutions under fornication, seduction, or adultery statutes. To quote Ploscowe, "Nowhere are the disparities between law in action and law on the books so great as in the control of sex crimes." MORRIS PLOSCOWE, *SEX AND THE LAW* 155 (1951). Nor is this a recent phenomenon. Geoffrey May cites data for the town of Groton, Mass., showing extremely high rates of fornication during the height of puritanism in the colonies. GEOFFREY MAY, *SOCIAL CONTROL OF SEX EXPRESSION* 254 (1930). When the Model Penal Code discussions review problems of enforceability, fairly good evidence for the claims is presented. When the discussions concern possible secular harms, claims are based largely on argument and opinion. See, e.g., the discussion of adultery. MODEL PENAL CODE § 207.1, comment at 204-10 (Tent. Draft No. 4, 1955).

¹⁷ A similar problem is evident in discussions about the effectiveness of correctional techniques. It is fashionable to think of the "new penology" as based on rational, scientific investigation; yet, there is little

This suggests something of the circular relationship likely to be maintained between social danger and moral condemnation as factors influencing public discussions and legislative decisions. The shift to an emphasis on the secular harms of various acts withdraws attention from their moral character. But in the absence of any clear-cut criterion of social danger, moral considerations will enter into and influence the perception of what is or is not socially dangerous. Until the consequences for society of various types of sex relationships are better known, changes in sex legislation will have to be based largely on changes in attitude and ideology, rather than on compelling evidence.

II

SOCIAL NORMS AND SEXUAL CONDUCT

The Kinsey volumes provided the first detailed account of sexual practices in the United States.¹⁸ Public interest in the reports revealed the high degree of curiosity and anxiety aroused by the topic. But precisely because the subject of sex calls forth anxieties and fears, there has been a tendency for behavioral scientists to shy away from the systematic study of sexual attitudes and norms. No study of social norms regarding sexual conduct comes close to matching in quantitative detail the knowledge about sex acts contained in the Kinsey volumes. The result is that we have only meager evidence concerning the social evaluation of sexual conduct, as distinguished from the conduct itself.

Such evidence as is available comes from a variety of sources. The Roper Fortune Surveys have included a few items on sex attitudes in their national sample surveys over the past twenty-five years. Attitude questionnaires have been administered to select samples of individuals, primarily college students. Some case studies of particular communities or subcultures yield a modicum of data on normative patterns. Finally, inferences can be drawn from certain gross features of societal concern for sex relationships.

The data bear upon three questions frequently raised in discussions of sex mores: Is there evidence of a trend toward increasing permissiveness? Are there widespread subcultural differences in social norms regarding sexual conduct? Do the norms bear a close relationship to sexual behavior?

A. Trends in Values

Changes in American values during the twentieth century point to a widespread increase in sexual permissiveness, at least as gauged by the increasing freedom and

evidence that current techniques are any more effective than those used in the past. Increasingly, evaluative research is carried out to test the effectiveness of various programs. Even the best of the studies are subject to methodological weaknesses that make for ambiguity in results, so that interpretations may be made consistent with the ideology of the interpreter. See Cressey, *The Nature and Effectiveness of Correctional Techniques*, 23 *LAW & CONTEMP. PROB.* 754 (1958).

¹⁸ ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) [hereinafter cited as *KINSEY MALE REPORT*]; ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) [hereinafter cited as *KINSEY FEMALE REPORT*].

lack of restraint in discussing sexual matters. Instead of the "Society for Sanitary and Moral Prophylaxis," the mid-twentieth century has a "Society for the Scientific Study of Sex." The pervasive influence of Freudian conceptions and the interest generated by the studies of Havelock Ellis are indicators of the same trend. The change has received support in modifications of obscene literature statutes, as brought forth most vividly in the recent case involving *Lady Chatterly's Lover*.¹⁹ Although commentaries speaking darkly of a "sex revolution" pervading every aspect of social life seem highly overdrawn,²⁰ there is abundant evidence of increasing public attention and discussion of sexual codes.²¹

There is a vast difference, however, between the change in mores allowing greater freedom of discussion and a change reflecting either greater approval or a higher incidence of particular types of sex relationships. It is more difficult to find solid evidence for the latter type of change. Kinsey's data suggested, for instance, that the major change in rates of premarital intercourse for females occurred with those born between 1900 and 1910. Women born during the period from 1910 to 1930 had roughly the same pattern as those born during the first decade of the twentieth century.²² And while younger-generation males had slightly higher rates of premarital intercourse with companions, the difference was largely offset by relatively more frequent contacts with prostitutes among the older-generation males.²³ The incidence of homosexuality and adultery also remained relatively constant, although suggesting slight intergenerational changes for different segments of the population.²⁴

Caution must be used in interpreting these findings, for there are well-known methodological problems in the Kinsey volumes, the most important being the use of nonprobability sampling, volunteer subjects, problems of recall among the older respondents, and the possible differences between reported and actual behavior.²⁵ Within these limitations, the findings give no indication of significant changes in the gross features of sexual conduct since the 1920's.

Studies of the social evaluation of sexual conduct reveal a similar pattern. Impressionistic accounts of changes in the mores suggest that intercourse outside of marriage is increasingly viewed as an acceptable form of conduct. Unfortunately, there

¹⁹ *Kingsley Int'l Picture Corp. v. Regents*, 360 U.S. 684 (1959).

²⁰ PITIRIM A. SOROKIN, *THE AMERICAN SEX REVOLUTION* (1956).

²¹ A major review of changes in American values shows increasing discussion of sex and a rising interest in extramarital relationships revealed in content analyses of best sellers. See Kluckhohn, *Have There Been Discernible Shifts in American Values During the Past Generation?*, in ELTING E. MORRISON, *THE AMERICAN STYLE* 145 (1958). For changes of a similar sort during earlier decades, see Newcomb, *Recent Changes in Attitudes Toward Sex and Marriage*, 2 AM. SOC. REV. 659 (1937). For interesting essays on the subject, see ABRAM KARDINER, *SEX AND MORALITY* (1954).

²² KINSEY FEMALE REPORT 242-46.

²³ KINSEY MALE REPORT 411-13.

²⁴ *Id.* at 413-17.

²⁵ An excellent review of the methodological problems in the Kinsey report on males is provided by WILLIAM G. COCHRAN, FREDERICK MOSTELLER & JOHN TUKEY, *STATISTICAL PROBLEMS OF THE KINSEY REPORT* (1954). These authors discuss the problem of establishing the stability of sexual patterns and caution against drawing more than tentative conclusions. *Id.* at 141.

is no solid empirical evidence that can be used to evaluate this claim over a long time span, for objective methods of attitude and opinion assessment were not in use prior to the 1930's. The best available evidence for a more recent period consists in responses of national samples to an item asked in 1937 and again in 1959 by the Roper polling agency. If major changes in attitudes have occurred during the past twenty years, this fact should be revealed in the Roper data.

The question asked on both polls was: "Do you think it is all right for either or both parties to a marriage to have had previous sexual experience?"²⁶ Responses are indicated in table one. The results show a surprisingly stable pattern over the past two decades. When it is remembered that the period spanned included publication and widespread discussion of the two Kinsey volumes, it is apparent that the fears voiced in some quarters—that knowledge of the Kinsey results may have widespread effect on sexual standards—have not materialized.

TABLE I
"DO YOU THINK IT IS ALL RIGHT FOR EITHER OR BOTH PARTIES TO A MARRIAGE TO HAVE HAD PREVIOUS SEXUAL INTERCOURSE?"

	1937	1959
All right for both.....	22%	22%
All right for men only.....	8%	8%
All right for neither.....	56%	54%
Don't know or refused to answer.....	14%	16%
	100%	100%

It is, indeed, risky to base a conclusion on such limited evidence. Other interpretations than that of stability could be given. There may have been widespread shifts in opposite directions for different segments of the population, such that they cancel out in the summary findings. There may have been important changes of such a subtle nature that they are not reflected by a single item on an opinion poll. The results may be reliable, but may have caught the population at particular points in a cycle of sexual attitudes, thus giving a false appearance of stability. All of these interpretations are possible and cannot be refuted without further evidence. The simplest interpretation, however, is that there has been little over-all change in attitudes toward this form of sexual conduct over the period spanned by the studies.²⁷

²⁶ The 1937 data are from *The Fortune Quarterly Survey: VIII*, Fortune, April 1937, pp. 111, 188-90. The 1959 results were supplied to the writer by Phillip K. Hastings, Director, The Roper Public Opinion Research Center, Williams College, Williamstown, Mass. Results from these surveys demonstrate the dangers in inferring trends from comparison of older and younger generations at a single point in time. In both surveys, the older generation were somewhat less approving. The trend data suggest that this is largely a function of age, rather than a changing climate of opinion.

²⁷ Studies of moral values among samples of college students provide some evidence of change over recent decades. One study compared the responses of students in 1939 and in 1956 on an instrument designed to assess the perceived importance of certain characteristics in the ideal marriage mate. It found a decline in the importance attributed to chastity consistent with an assumed change from traditional to romantic and companionship factors as bases for mate selection. McGinnis, *Campus Values in Mate Selection: A Repeat Study*, 36 SOCIAL FORCES 368 (1958). A similar study, however, notes an increase

B. Socioeconomic Status and Sex Attitudes

One argument frequently raised in support of a change in legal controls is that communities are no longer homogeneous with respect to sexual standards—that the wide range of standards held in different segments of the population precludes application of universalistic legal standards. Kinsey's data are usually cited in support of this contention.²⁸ The most important of Kinsey's findings for present purposes are the variations in rates of premarital intercourse and in techniques of sexual arousal. Kinsey found that rates of premarital intercourse for males were highest at low educational levels and were considerably lower among the college-educated segment of his population.²⁹ At the same time, he found that lower-level couples were likely to restrict their sexual contacts to the most direct form of sexual union, while upper-level couples employed a wide variety of coital techniques, mouth and breast stimulation, and manual and oral forms of genital stimulation. For example, oral stimulation of female genitalia was found in sixty per cent of the college-educated segment, but in only twenty and eleven per cent of the high-school and grade-school histories, respectively.³⁰ The direction of these relationships suggests that sex statutes limiting premarital intercourse are most frequently violated by lower-class members, while statutes defining various forms of heterosexual perversions are more likely to be violated by middle- and upper-level persons.

There is little systematic evidence to determine whether the normative patterns are consistent with the differential incidence rates for perversions. Kinsey suggests that his lower-level respondents viewed with disgust some of the petting and coital practices of middle- and upper-level persons, although systematic evidence is lacking. The pattern, if verified, is an interesting reversal of the usual view that legal standards of sexual conduct reflect a middle-class morality.

More evidence is available concerning the social evaluation of premarital intercourse at differing socioeconomic levels. Between 1939 and 1943, the Roper agency asked questions about sexual attitudes in three of their sample surveys.³¹ Typical results are reported in tables two and three. The question for table two was: "Do you consider it all right, unfortunate or wicked when young men (women) have sexual relations before marriage?" For table three, the question was: "Should men (women) require virginity in a girl (man) for marriage?" Variation in response

in the severity of moral judgment regarding forms of promiscuity. See Rettig & Pasamanick, *Changes in Moral Values Among College Students: A Factorial Study*, 24 AM. SOC. REV. 856 (1959). While the increase in severity of judgment on three items dealing with sex was less than that for many other items, the values are still quite strong. For instance, "having illicit sex relations after marriage" was judged a more severe moral transgression than "nations at war using poison gas on the homes and cities of its enemy behind the lines"; or "a legislator, for a financial consideration, using his influence to secure the passage of a law known to be contrary to public interest."

²⁸ MODEL PENAL CODE § 207.1, comment at 266-07 (Tent. Draft No. 4, 1955).

²⁹ KINSEY MALE REPORT 347.

³⁰ *Id.* at 576-77.

³¹ I wish to acknowledge the aid of the Roper Public Opinion Research Center in making the data available for analysis. Unfortunately, evidence on class distribution of responses for the 1959 item was not yet available for study.

by socioeconomic status is similar in both tables, although the strength of the relationship varies with the wording of the question.³² The relationship is also found when occupation is used as the relevant variable. Among males, the proportion who felt such activity was wicked increased from twenty-six per cent among white-collar and professional workers to thirty, thirty-five, and thirty-six per cent among blue-collar, unemployed, and farmers, respectively.

TABLE II
"DO YOU CONSIDER IT ALL RIGHT, UNFORTUNATE OR WICKED WHEN YOUNG MEN
(WOMEN) HAVE SEXUAL RELATIONS BEFORE MARRIAGE?" (WOMEN ONLY; N = 5220)

Socioeconomic Status	Wicked for Men	Wicked for Women
Upper.....	28%	36%
Upper-Middle.....	34%	43%
Lower-Middle.....	40%	50%
Lower.....	53%	62%

TABLE III
"SHOULD MEN (WOMEN) REQUIRE VIRGINITY IN A GIRL (MAN) FOR MARRIAGE?"
(WOMEN ONLY; N = 2570)

Socioeconomic Status	Men Should Require in Women	Women Should Require in Men
Upper.....	64%	42%
Upper-Middle.....	66%	47%
Lower-Middle.....	71%	53%
Lower.....	72%	52%

What is surprising about the Roper results is not the degree of variation by social class, but its direction. Those in lower social strata are more likely to express disapproval of intercourse outside of marriage than are those in middle and upper positions. This is precisely the reverse of the direction for the behavioral record as found by Kinsey and others. The discrepancy could be due to such factors as a greater tendency among lower-class respondents to give what they perceive as socially desirable responses to middle-class interviewers, or the correlation of social class with religion or other variables. Certainly, the data are not strong enough to accept the finding as confirmed; yet, it does call into question the inference, frequently drawn by Kinsey's interpreters, that the social-class differences in rates are strongly supported by class differences in sex attitudes and values.³³

There are reasons to believe that the relationship between overt sex acts and cultural values is much more complex than is usually presumed. Thus, a growing body

³² The socioeconomic labels are interpreted from an index used by the Roper agency and may not match the distinctions made in other studies. These distributions probably fail to catch the extreme top and bottom of the socioeconomic scale, where different patterns might emerge. Data are for white respondents only.

³³ Kinsey's own interpretations frequently were based on this assumption. Other examples are included in JEROME HIMELHOCH & SYLVIA FAVA, *SEXUAL BEHAVIOR IN AMERICAN SOCIETY* 175-205 (1955).

of research has documented the higher degree of intolerance for deviant behavior among those of low education and socioeconomic position.³⁴ The response to sex may be part of the broader tendency to see the world in a good-evil dichotomy. The tendency is reinforced by the dogmatism of fundamentalist religious groups likely to flourish and have greatest appeal to those in lower social strata.³⁵ Class differentials in tolerance for sexual expression are also indicated in recent studies of child-rearing patterns. Working-class mothers are found to be far less permissive and to use more punitive measures for preventing sexual exploration.³⁶ These findings would lead one to expect greater rather than less disapproval at lower socioeconomic levels.

At the same time, the objective life situation of lower socioeconomic groups may predispose them to greater pressure for engaging in the activity. Thus, studies of lower-class urban areas point to the frequency of female-based households in which if the mother is to have any normal sexual outlet, it becomes, by definition, adultery.³⁷ The greater amount of premarital intercourse among lower-class girls may reflect less a difference in stated values than the use of sex as a means of attracting males of higher status, in the absence of alternative qualities of attraction.³⁸ A related and important feature concerns differences in the use and effectiveness of social-control techniques. For example, the more punitive methods of child-rearing used in lower socioeconomic strata may be less effective in producing long-term internal controls, even though parental attitudes may be similar to those in other strata.

All of these features may operate to suppress the effect of cultural values on overt conduct. One of the reasons the relationships between socioeconomic status, sex attitudes, and sex behavior are not yet clearly understood is that they are probably quite complex, involving differential pressures for engaging in the behavior and different mechanisms of control. A particular pattern of conduct emerges from many social influences and is rarely a simple reflection of stated cultural values. These influences are frequently neglected in drawing conclusions from the Kinsey research.³⁹

³⁴ SAMUEL A. STOFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES 89-108 (1955); Lipset, *Democracy and Working Class Authoritarianism*, 24 AM. SOC. REV. 482 (1959).

³⁵ See LISTON POPE, MILLHANDS AND PREACHERS (1942).

³⁶ ROBERT R. SEARS, ELEANOR E. MACCOBY & HARRY LEVIN, PATTERNS OF CHILD REARING 428 (1957).

³⁷ See Miller, *Implications of Urban Lower-Class Culture for Social Work*, 23 SOC. SERV. REV. 225 (1959); see also ALLISON DAVIS & JOHN DOLLARD, CHILDREN OF BONDAGE 272-90 (1940).

³⁸ See Kanin & Howard, *Postmarital Consequences of Premarital Sex Adjustments*, 23 AM. SOC. REV. 558 (1958); see also Ehrmann, *Influence of Comparative Social Class of Companion Upon Premarital Heterosexual Behavior*, 17 MARRIAGE & FAMILY LIVING 48 (1955).

³⁹ A related point of misinterpretation hinges on Kinsey's use of an accumulative-incidence curve, which reflects single acts engaged in only during childhood, or perhaps on only one occasion as an adult. One can hardly assume that because an act has been committed at least once by the majority of the population, it is, therefore, regarded as culturally acceptable. Yet, this argument has apparently been used in court cases. See HIMELHOCH & FAVA, *op. cit. supra* note 33, at 244-50. On this basis, one would withdraw a large proportion of penal legislation, at least as it applies to males, including that governing tax evasion, malicious mischief, auto misdemeanors, disorderly conduct, and larceny. See Wallerstein & Wyle, *Our Law Abiding Law-Breakers*, 25 PROBATION 107 (1947).

C. Other Structural Characteristics and Sex Attitudes

Considerable variation in sex attitudes is revealed when characteristics other than social class are studied. Even a single question on a public opinion poll reveals important differences in attitude by race. Where roughly fifteen per cent of the white females said that premarital intercourse for males was "all right," twenty-nine per cent of the Negro females gave that response. The differences in tolerance for women who engaged in the same behavior ranged from roughly five per cent for white respondents to seventeen per cent for Negroes.⁴⁰ Evidence on sex behavior leaves no doubt that the attitudinal differences are carried out in action. A study of army recruits located seven virgins among 500 Negro draftees.⁴¹ Studies of illegitimate birth point to the extremely high rates for Negro girls in urban areas.

Kinsey's results revealed the influence of religious affiliation on sexual attitudes and behavior. Increasing rates of premarital intercourse are observed as one moves from Jewish to Catholic to Protestant groups. For each religious grouping, the proportion of women voicing regret for having premarital intercourse was greatest among the most active believers.⁴²

Regional and rural-urban differences are revealed in recent opinion poll results: permissive attitudes are highest in the urban Northeast (twenty-eight per cent), followed by the Far West (twenty-six per cent), the South (twenty-three per cent), and the Mid-west (fifteen per cent).⁴³ The same data also indicate that the double standard applies most clearly to Southern manhood. Thirteen per cent of the Southern respondents, compared to about five per cent in the other areas, say that premarital sex is "Okay for men only."

The above review of variation in social norms in differing sectors of society is probably a conservative statement of the actual variation, for it has been impossible to assess the combined effect of the several characteristics. At the same time, citation of percentages engaging in this or that conduct or holding particular attitudes tends to obscure the general lack of clarity of sex codes. With the exception of certain extremes found among particular ethnic or religious subcultures, it is probably fair to say that no single normative pattern is institutionalized in any large segment of the population, let alone the society as a whole. The wide variation in response to the Kinsey volumes gives abundant testimony to this fact.⁴⁴

In part, the lack of clarity of sex codes is due to the specificity of sex attitudes. Whether premarital intercourse is viewed as acceptable or not depends on many features of the relationship between the couple. The sociologist William F. Whyte noted that Italian street-corner boys made a clear differentiation between "good girls," with whom intercourse was prohibited, and "lays" with whom it was highly

⁴⁰ In response to the question reported in table II *supra*.

⁴¹ Hohman & Schaffner, *The Sex Lives of Unmarried Men*, 52 AM. J. SOC. 501 (1947).

⁴² KINSEY FEMALE REPORT 319.

⁴³ From the 1959 Roper survey reported in table I *supra*.

⁴⁴ See Palmore, *Published Reactions to the Kinsey Report*, 31 SOCIAL FORCES 165 (1952).

desirable.⁴⁵ Studies of college students and middle-class sexual patterns suggest that intercourse is more acceptable to girls if part of a love relationship, while males are less likely to view it as acceptable under those conditions (although at any point, of course, premarital intercourse for males is considered more acceptable than for females.)⁴⁶ Until recently, the social scientists' concern with sexual attitudes and conduct was limited largely to the gross features of such conduct as revealed by frequency counts and general opinion. The meaningful context of the behavior or attitude was seldom studied in detail. The growth of a body of knowledge about the meaning of the activity for participants should provide a more useful set of empirical findings on the social distribution of sex attitudes and behavior.⁴⁷

A more pervasive influence is the lack of visibility of sex attitudes and behavior. To an important degree, no one knows what standards others are employing. Enough life remains in the puritan ethic to prevent persons from expressing their attitudes openly. This quite naturally produces a condition of pluralistic ignorance. Without this element, it would be hard to account for the amazing public interest in the Kinsey reports. And so long as the condition remains, it will be impossible to achieve any genuine normative consensus.

D. Homosexuality

Little can be said about attitudes toward other forms of sexual relations between consenting adults. While much has been written about the homosexual problem, there is almost no objective information on the degree of public tolerance for homosexuals or on conceptions of the desirability of penal sanctions as a means of control. Although mass responses are still shrouded in mystery and fear, the trend is surely toward a more enlightened, dispassionate perspective.⁴⁸

Some inferences as to sources of changing perspectives can be drawn from other studies of tolerance toward deviance. As noted above, an increasing body of research

⁴⁵ Whyte, *A Slum Sex Code*, 49 AMER. J. SOC. 24 (1943).

⁴⁶ Ehrmann, *Premarital Sexual Behavior and Sex Codes of Conduct with Acquaintances, Friends and Lovers*, 38 SOCIAL FORCES 158 (1959).

⁴⁷ One of the major complaints in popular literature about the Kinsey research was the overly biological orientation and lack of attention to love and affection as basis for sex relationships. Some of Kinsey's results as well as those of other investigators suggest, however, that where the abstinence standard no longer exists, the emerging standard permits coitus when part of a stable, affectionate relationship. See Reiss, *The Treatment of Pre-Marital Coitus in "Marriage and the Family" Texts*, 4 SOCIAL PROBLEMS 334 (1957). An interesting recent study finds a high degree of ego involvement in premarital sexual relationships, particularly among middle-class women, and suggests some of the conditions that encourage intimacies for females in the middle and upper socioeconomic strata. See Vincent, *Ego-Involvement in Sexual Relations: Implications for Research on Illegitimacy*, 65 AM. J. SOC. 287 (1959).

⁴⁸ Contributing to and reflecting this trend is an increasing willingness on the part of some homosexuals to make their problems a matter for public concern. See, e.g., PETER WILDEBLOOD, *AGAINST THE LAW* (1956). And note the signs of incipient pressure-group formation in the following quotation from the trade journal, *One*, published in Los Angeles: "No American Politician regards as humorous a millions votes. . . . Let's say the membership dues are . . . fifty cents a month . . . six dollars a year . . . multiply that by a million and you have the gigantic fighting strength . . . \$6,000,000. . . . Nobody will care whose money it is . . . that of screaming pansies, delicate decorators or professional wrestlers. Nobody will give a damn because this is the U.S.A. and money talks. . . ." From the Sept. 1953 issue of *One*, as quoted in JAMES M. REINHARDT, *SEX PERVERSIONS AND SEX CRIMES* 32 (1957).

suggests that tolerance toward nonconforming behavior may be a relatively general trait that may cut across many specific forms of deviation.⁴⁹ Tolerance is greatest among the younger generation and those with most education. The sociologist Samuel Stouffer's report on political nonconformity found tolerance also greater among community leaders.⁵⁰

Whether these results hold for attitudes toward sexual nonconformity can only be determined by further study. The findings at least suggest the important sectors of the population that may be least resistive to changes of the type recommended by the Wolfenden Report in England. While such proposals are probably still in advance of public opinion, the forces making for greater tolerance are likely to remain and should be a sign of hope for supporters of more liberal legislation regarding homosexuals.⁵¹

E. Need for more Adequate Information

Review of objective data on social norms and sexual conduct reveals above all else the paucity of useful information. Aside from an occasional item in an opinion poll, a handful of studies of college students, and one or two anthropological accounts, there is nothing that even makes for intelligent speculation as to the sources and types of community reaction to sexual deviations between consenting adults. Such evidence as is available suggests that while there has been no great change in *standards* of sexual conduct at least over the past twenty years, there is a general trend toward greater *tolerance* of various forms of sexual relationships. Some of the more recent proposals for change in legislation invoke distinctions between mental illness, crime, and sin that major segments of the public are probably not yet prepared to understand or accept. Perhaps the single most important factor making for public recognition of these distinctions is the increase in average level of education.

The outstanding fact remains that no major study has been made of attitudes and norms regarding sex conduct. Any conclusions must be tempered by awareness of the flimsy evidence on which they are based. Within this arena of ignorance, the American Law Institute is attempting to design new legislation concerning sexual behavior. Important recommendations are being decided at least partially on the

⁴⁹ See authorities cited, note 34 *supra*. These results refer largely to response to behavior clearly defined as deviant. Whether a given pattern of behavior is recognized as deviant in the first place is a related, but separate, issue. At least in regard to mental illness, there is some evidence that lower-class persons with little education are less likely to recognize a particular behavior pattern as that of a mentally-ill person than are more educated, middle-class persons. See AUGUST B. HOLLINGSHEAD & F. C. REDLICH, *SOCIAL CLASS AND MENTAL ILLNESS* 171-93 (1958).

⁵⁰ STOUTER, *op. cit. supra* note 34, at 26-57.

⁵¹ Trends consistent with those noted above have been found for one item on sex criminals taken from a national survey. In response to the question: "What do you think is the best thing to do with sex criminals, send them to a hospital or a jail?," the younger and more educated were much more likely to choose the hospital. Significantly, a majority at all educational levels favored the hospital, as did a majority in all age groups up to age 45. See Woodward, *Changing Ideas on Mental Illness and Its Treatment*, 16 AM. SOC. REV. 443 (1951).

basis of guesses as to how the public or legislative officials will react.⁵² Consideration of controversial proposals could benefit from more adequate information on public attitudes.⁵³

III

THE SEX OFFENDER

Certain types of sex offenders are either a danger to the community or a nuisance that the community need not tolerate. Their offenses include rape, indecent liberties, exhibitionism, and incest, as well as a variety of related acts. The conception that sex offenders are different from any other types of law violators has led to legislation that results in a placement of sex offenders in a kind of limbo, somewhere between the criminal and the mentally ill. The remainder of this paper directs attention to the problems raised by sex offender legislation and to some possible sociocultural factors in the genesis of sex deviation.

A. History and Critique of Sex Offender Laws

Legislation defining sex psychopaths and establishing administrative procedures for their custody, treatment, and release was passed by some thirteen states between 1937 and 1950, and has been extended to other states since that time. Procedures leading up to the legislation were similar in the different jurisdictions. In a review of the development of sex psychopath laws, the late criminologist Edwin Sutherland noted a sequence characterized by (a) arousal in a community of a state of fear as a result of a few serious sex crimes, (b) agitated community response, leading to (c) the appointment of a committee that gathered information and made recommendations that generally were uncritically accepted by state legislatures.⁵⁴ The work of the committees proceeded largely in the absence of facts. Sutherland noted that the laws embodied a set of implicit assumptions that were explicit in much of the popular literature on sex offenses. These included the notion that all sex offenders were potentially dangerous, that they were very likely to repeat their offenses, that they can be accurately diagnosed and efficiently treated by psychiatrists. The laws were passed in the name of science, although there was little scientific evidence as to the validity of the assumptions underlying the statutes.

⁵² See the discussion of proposed changes in legislation regarding deviate sexual intercourse. MODEL PENAL CODE § 207.5, comment at 276-81 (Tent. Draft No. 4, 1955).

⁵³ To be sure, there are weaknesses and pitfalls in the gathering and interpretation of opinions on controversial issues. But these problems are well known to experts in opinion-research and are subject to increasing control. One need not suggest that public opinion replace legislative and judicial opinion in order to see the value that can come from knowledge of public attitudes, especially in areas where presumed public response is explicitly considered in making important decisions. For a recent study and discussion of the use of opinion surveys and their application to one area of legal concern, see JULIUS COHEN, REGINALD A. H. ROBSON & ALAN BATES, *PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW* (1958). This is not to suggest that public opinion studies are the only or necessarily the most appropriate means of establishing the relationship of public opinion to legal process. The University of Chicago Jury Project is one instance of a much different approach that promises to reveal some of the areas of agreement and disagreement between the response of judge and of jury to certain types of offenses. See Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959).

⁵⁴ Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142 (1950).

The act of passing the statutes set in motion the kind of data-gathering process that was needed to establish adequate legislation in the first place. Some of the legislation required study of the effectiveness of the statutes along with studies of sex offenders. These studies drew attention to the weaknesses of the legislation.

Many of the criticisms have been presented in reports prepared for state legislatures and will be mentioned only briefly here.⁵⁵ The label "sex psychopath" is so vague as to make administration of statutes unreliable.⁵⁶ Sex offenders are less likely to repeat their crimes than are other types of offenders.⁵⁷ Very few sex offenders present a grave social danger.⁵⁸ Current diagnostic techniques are incapable of distinguishing reliably between the potentially dangerous and those that are not dangerous.⁵⁹ There has been no test of the assumption that treatment techniques are effective in rehabilitation of sex offenders.⁶⁰

Given these findings, it is not surprising that members of the legal profession were reluctant to approve of the usual procedures for administration of the statutes. Significantly, the opposition was not along lines usually assumed to separate legal from psychiatric viewpoints: a free-will, punitive orientation *versus* deterministic, permissive orientation. Rather, the criticism has been directed to the possible denial of due process to offenders. Since the statutes typically called for commitment up to life, even for minor offenses, the usual safeguard of a maximum sentence was missing. In addition, the administrative procedure for release, frequently requiring certification that the offender was no longer a danger to the community, made release very difficult. Administrators were understandably reluctant to assert that the patient was cured.⁶¹

While these problems signify dissatisfaction with many of the procedures built into the earlier statutes, there is still no common agreement on the most appropriate solutions. Some states have dropped the label "sex psychopath" from their statutes, have restricted the scope of the statutes to more serious offenders, and have required that the offender be held no longer than the maximum sentence under traditional criminal provisions. One of the problems posed by these changes is

⁵⁵ Reports with detailed analyses of sex offender statutes and experience in their use include PAUL W. TAPPAN, *THE HABITUAL SEX OFFENDER* (1950) (prepared for the state of New Jersey); CALIFORNIA DEP'T OF MENTAL HYGIENE, *FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH* (1954) [hereinafter cited as CALIFORNIA REPORT]; GOVERNOR'S STUDY COMM'N, *REPORT ON THE DEVIATED CRIMINAL SEX OFFENDER* (1951) (Michigan).

⁵⁶ TAPPAN, *op. cit. supra* note 55, at 36-42; CALIFORNIA REPORT 20-38.

⁵⁷ TAPPAN, *op. cit. supra* note 55, at 22-25. Tappan cites a New York study that found that only 7% of convicted sex offenders were re-arrested for sex offenses over a 12-year period. A recent California study also found 7% sex recidivism among sex offenders. See Frisbie, *The Treated Sex Offender*, *Fed. Prob.*, March 1958, p. 18.

⁵⁸ TAPPAN, *op. cit. supra* note 55, at 20-22. See also ALBERT ELLIS & RALPH BRANCALE, *THE PSYCHOLOGY OF SEX OFFENDERS* 32 (1956).

⁵⁹ For a beginning in this direction, see CALIFORNIA REPORT 142-47.

⁶⁰ TAPPAN, *op. cit. supra* note 55, at 15-16. Of course, a major problem has been that treatment has been almost totally lacking. Many states have passed laws requiring treatment without establishing treatment facilities. Beyond this, however, any treatment technique will have to be very effective if it is to reduce significantly the rate of recidivism, for the rate is already quite low.

⁶¹ TAPPAN, *op. cit. supra* note 55, at 34.

illustrated by the experience in Massachusetts. Massachusetts revised its psychopathic personality statute in 1954. The new law discarded the term "psychopath" and included the requirement that an offender must be released at the expiration of his maximum sentence. The law was deemed inadequate after a double murder was committed by an offender whose release from the state reformatory could not be prevented by provisions of the 1954 act. The law was quickly amended to allow for indefinite commitment up to life for certain types of sex offenders.⁶²

The case points to a familiar problem in the visibility of mistakes in the processing of offenders. Errors made in releasing men too early are publicly observable. Under a statute allowing commitment up to life, however, errors made in keeping men who may, in fact, be cured cannot be tested, because by the nature of the procedure, they are not given a chance either to succeed or to fail. While every failure of early release may come to public attention, errors of keeping men too long cannot be detected. Such errors may be quite frequent in the absence of accurate diagnostic procedures. There is always the danger of undue restriction of civil liberties in attempts to provide adequate protection to the community.

B. Developmental Careers of Sex Offenders

Perhaps the single most important outgrowth of recent experience with sex statutes is that we are now aware of how little reliable knowledge is available. Until recently, the major source of ideas about sex offenders stemmed from clinical reports on a wide variety of sex deviants. The case materials have filled most of the books written on sexual deviation.⁶³ Although the cases may enrich clinical understanding, they do not provide an adequate basis for the development of sound administrative procedures. The clinical interpretations stand logically not as fact, but as hypotheses requiring test.⁶⁴ Since the cases are drawn from an unknown population of offenders, there is no adequate basis for generalization. And since adequate control groups are not employed, any claims as to therapeutic effectiveness are claims, and no more. They remain untested.

The impetus to research provided by the sex psychopath statutes has resulted in knowledge that calls into question some of the earlier clinical findings. While the research is still at a descriptive rather than an experimental stage, it has been effective in casting doubt on assertions that all or almost all sex offenders are highly dis-

⁶² EDWIN POWERS, *THE BASIC STRUCTURE OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN MASSACHUSETTS* 15-17 (United Prison Ass'n of Mass., Res. Div. Rep. No. 5, 1957).

⁶³ BENJAMIN KARPMAN, *THE SEXUAL OFFENDER AND HIS OFFENSES* (1954); JOSEPH PAUL DE RIVER, *THE SEXUAL CRIMINAL* (1950); REINHARDT, *op. cit. supra* note 48.

⁶⁴ For a clear, concise statement of the needs and uses of controls in psychiatric research, see COMM. ON RESEARCH, GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REP. NO. 42, *SOME OBSERVATIONS ON CONTROLS IN PSYCHIATRIC RESEARCH* (1959). Neglect of the distinction between fact and hypothesis is illustrated in the following exchange in a discussion of a paper on sex psychopaths written by the psychiatrist Benjamin Karpman. One of the discussants, Albert Ellis, suggested that Karpman's propositions should be regarded as hypotheses rather than facts, and that evidence for some of them was lacking; to which Karpman replied: "I deny these allegations in toto. All of my statements are based on actual clinical material; I do not have one bit of theory." KARPMAN, *op. cit. supra* note 63, at 511-12, 525.

turbed. Systematic study of 300 offenders committed to the diagnostic facility in New Jersey showed that on the basis of psychiatric diagnoses, fully forty-three per cent of the offenders were classified as normal or only mildly neurotic.⁶⁵ This raises the question of what distinguishes the psychiatrically normal from the abnormal sex offender. More broadly, are there systematic differences in the developmental careers of different types of sex offenders? Suggestions of such differences are apparent in recent research.

A distinction can be made between aggressive and passive offenders. The former usually commit offenses involving attempted or completed intercourse with a legitimate sexual object—*i.e.*, a person of the opposite sex beyond the age of puberty. Most rapes and sexual assaults fall in this category. The passive offenses include exhibitionism and noncoital sex play with children. In terms of physical danger, the former category presents the most serious social problem. The sex statutes were passed largely to control the violent acts of rape and sexual assault. Yet, available evidence suggests that as a group, such offenders are less likely to exhibit clear-cut pathological symptoms and may have more in common with non-sexual offenders than with the passive sex deviants.

The report on sex offenders processed through the New Jersey diagnostic center provides information on the characteristics of offenders classified by type of offense. Selected findings from the study are reproduced in table four for the offense categories falling most clearly at the aggressive and passive poles.⁶⁶

The aggressive offenders are more likely to be judged normal by psychiatric diagnosis. They are less inhibited sexually and tend to give fewer indications of severe emotional disturbance. Fewer of them are judged to have been exposed to severe emotional deprivation during childhood. Significantly, their prior arrest histories show few sexual offenses, but many nonsexual offenses. The ratio of non-sexual to sexual offenses is much higher for the aggressive than for the passive offenders. Finally, they are much more likely to show signs of hostility, a characteristic most common among property offenders from delinquent or criminal subcultures.⁶⁷

Evidence from the California studies of sexual deviation supports the pattern noted above. Case descriptions of the most serious and aggressive sex offenses committed by delinquents in San Francisco revealed that over half of the cases were gang-

⁶⁵ ELLIS & BRANCALE, *op. cit.* *supra* note 58, at 94.

⁶⁶ See *id.* at 34, 38, 42, 46, 49, 56, 62. Two of the major categories excluded from the above review are statutory rape and incest. Ellis and Brancale provide convincing evidence of the essential normality of statutory rape offenders, and support the conclusions of Ploscowe and others that the age limit in such cases should be reduced. Evidence on incest cases suggests, as would be expected, that offenders are more like the aggressive than the passive offenders in terms of social and criminal background.

⁶⁷ The findings of the New Jersey study are, of course, subject to many weaknesses commonly found in sex offender research. As the authors of the study note, there is no way of knowing how their sample differs in background from sex offenders sentenced to state prisons or from those who are undetected. The number of cases is much too small, especially for the rapists, to place much confidence in the results. The characterizations of offenders, with the exception of prior arrest data, are undoubtedly colored by knowledge of which type of offense they committed.

TABLE IV
DIFFERENCES BETWEEN AGGRESSIVE AND PASSIVE SEX OFFENDERS ON
SELECTED CHARACTERISTICS*

	Diagnosed normal or mildly neurotic	Commitable to mental institution	Over-inhibited	Severe emotional disturbance
Aggressive offenders				
Sex assault.....	48	24	48	48
Forcible rape.....	38	25	50	63
Passive offenders				
Noncoital sex play with children.....	20	45	66	66
Exhibitionists.....	30	29	72	63

	Previous arrest for sex offenses	Previous non-sex arrests	Underlying hostility	(No. of subjects)
Aggressive offenders				
Sex assault.....	14	48	72	21
Forcible rape.....	12	50	75	8
Passive offenders				
Noncoital sex play with children.....	51	43	35	51
Exhibitionists.....	34	23	25	89

* Each column contains the percentages of each type of offender characterized as indicated by column headings. Thus 30% of the exhibitionists were diagnosed normal or only mildly neurotic. Number of cases on which the percentages are based appear in the lower right column.

motivated. Furthermore, of the thirty-seven serious offenders studied, half had previous records for nonsexual offenses, only three had previous sex arrests. Reading of the case descriptions further shows that the gang attacks were most frequently directed toward girls in middle or late adolescence, while the offenses against very young sexual objects were more likely to be committed by lone offenders.⁶⁸

Ethnic differences in rates of sex offenses give further support to this pattern. The California research showed that Negroes and Mexicans were overrepresented in the rape category, underrepresented in offenses against children.⁶⁹ The New Jersey experience suggested that Negro sex offenders were less emotionally disturbed than their white counterparts.⁷⁰ Both of these findings are consistent with studies of racial differences in homicide rates and suggest the influence of cultural differences in restraints on the use of violence to resolve interpersonal affairs.⁷¹

The evidence thus suggests that the typical aggressive sex offender may be less "sick" than is usually supposed. Their backgrounds have much in common with nonsexual offenders who come from crime-inducing cultural settings. Instead of conceiving of their conduct as resulting from a highly specific and grossly deviant sexual motivation, it is perhaps more valid to view their offenses as part of a broader behavior system in which force may be used to attain their goals. It is the use of force, rather than any specifically deviant sexual motivation, that distinguishes these

⁶⁸ CALIFORNIA REPORT 132-35.

⁶⁹ *Id.* at 101-02.

⁷⁰ Ellis, Doorbar & Johnston, *Characteristics of Convicted Sex Offenders*, 40 J. SOC. PSYCH. 14 (1954).

⁷¹ MARVIN E. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 329 (1958).

offenders from those who fall within the law.⁷² Psychiatric study has revealed the frequency with which sexual motivations underlie such nonsexual crimes as arson and certain types of burglary. The suggestion here is that the reverse may hold for certain types of aggressive sex offenders. In a society stressing active mastery of the environment over passive acquiescence, perhaps it is not surprising that the aggressive sex offender who overresponds is judged less disturbed than the passive exhibitionist.⁷³

Brief mention may be made of two additional points where sociological conceptions usually applied to nonsexual offenses may have bearing on deviant modes of sexual response. One of these points concerns the way in which the social structure exerts pressure on persons to use deviant means of achieving culturally acceptable goals. High rates of deviance are presumed to occur among those segments of the population that are least fortunately situated in terms of their abilities to achieve valued goals by legitimate means.⁷⁴ The same conception is applicable to the achievement of sexual gratification. Prisons are, of course, an extreme case of a structure that promotes deviant means of sexual outlet. But less extreme instances are in evidence as well. Thus, two studies note high rates of incest in rural populations, where the choice of alternatives to the wife, given dissatisfaction with her performance, is severely limited.⁷⁵ And prostitution flourishes in lumber and mining areas and in the central sectors of cities, where the sex ratio is abnormally high. These illustrations remind us that the availability of legitimate sexual outlets is itself socially-structured; resort to deviant outlets will reflect these structural features and need not be conceived solely as a result of faulty personality makeup.

Second, the dyadic character of many types of crime means that the victim may play more than a passive role. Wolfgang's recent study of Philadelphia homicides revealed that fully twenty-six per cent were victim-precipitated.⁷⁶ Similar findings

⁷² The psychiatrist Richard L. Jenkins has observed that "the difference between the law-abiding man and the rapist lies typically not in a difference of sex impulse, but in a difference of inhibition and consideration for the personality of others." Jenkins, *The Making of a Sex Offender*, in CLYDE B. VEDDER, SAMUEL KOENIG & ROBERT E. CLARK, *CRIMINOLOGY* 293, 295 (1953). The above observations seem consistent with this view, but are at variance with psychiatric analyses, which see even statutory rape as fundamentally tied up with the oedipus complex, representing an unconscious attack upon the parent. See, e.g., DAVID ABRAHAMSEN, *WHO ARE THE GUILTY?* 184-85 (1952). Any theory that seeks to interpret sex aggression as a highly neurotic or psychopathic act must consider the prevalence of aggressive sexual acts among presumably normal populations of college students. See Kanin, *Male Aggression in Dating-Courtship Relations*, 63 *AM. J. SOC.* 197 (1957). The Kanin article points to some of the factors that may prevent these cases from becoming officially labeled as felonious aggressions.

⁷³ The culture of prison inmates provides insight into the differences between aggressive and passive sex offenders. No special status is conferred on aggressive offenders or those convicted of statutory rape. In fact, the latter are viewed as having "bum beefs" as a result of "pick on your own size" laws designed to allow promiscuous teen-agers to get off the hook when they become pregnant. Offenders who engage in nonviolent sex acts with children, on the other hand, are relegated to the bottom of the social structure and referred to in derogatory terms as "rapos"—so afraid of women they had to pick on children.

⁷⁴ See ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 131-94 (rev. ed. 1957).

⁷⁵ JOHN LEWIS GILLEN, *THE WISCONSIN PRISONER* 107-16 (1946); Reimer, *The Background of Incestuous Relationship*, in VEDDER, KOENIG & CLARK, *op. cit.* *supra* note 72, at 301.

⁷⁶ WOLFGANG, *op. cit.* *supra* note 71, at 245.

might result from careful study of those convicted of rape, where the offense frequently follows an evening of drinking and mutual sexual arousal. Consideration of the victim's role means that the offense can be viewed as a product of a social situation; its explanation cannot easily be reduced to a search for the childhood emotional disorders of the party who becomes labeled the offender.⁷⁷

These observations suggest some ways in which sociocultural and situational features may be related to deviant sexual behavior. Assumptions that direct attention solely to psychogenic factors may lead to an inaccurate conception of the causal processes involved, and hence to treatment programs that neglect important sources of the deviation. Specifically, further research may reveal that many aggressive sex offenders are responding to culturally learned patterns of aggression and to situational factors that are unlikely to be relieved by the usual methods of clinical psychotherapy. Patterns of cultural learning as well as psychogenic disorders may be reflected in their offenses. This may partially explain why such offenders are deemed generally less amenable to treatment than the less dangerous but more disturbed passive offenders.⁷⁸

Sociological conceptions of crime are heavily influenced by the sociologist's concern for the impact of culture and social organization. These elements are revealed most clearly in such types of offenses as professional crime, white-collar crime, and gang delinquency. Some of the evidence reviewed above suggests that there may be important sociogenic features in the development of certain types of sex offenders, and that further study could profit from an interdisciplinary approach to the problems posed by such offenders. The growing need for systematic knowledge should lead to research designed to reveal the combined influence of sociogenic and psychogenic sources of sexual deviation. Such research may suggest inadequacies in the conception that most sex offenders are a special breed of criminal requiring unique laws and administrative procedures for their control.

⁷⁷ The Model Penal Code expresses recognition of these elements in suggesting that where a woman loses capacity to control her own conduct by voluntary use of intoxicants or drugs, any resulting intercourse cannot be charged as rape, although it can be under most existing statutes. MODEL PENAL CODE § 207.4, comment at 248-49 (Tent. Draft No. 4, 1955).

⁷⁸ ELLIS & BRANCALE, *op. cit. supra* note 58 at 78.

SEX OFFENSES: A CLINICAL APPROACH

BERNARD GLUECK, SR.*

It is assumed in this article that a clinical approach to the problem of the sex offender based on genetic-dynamic considerations would add to our understanding of this problem. The material contained in this presentation has been familiar to students of the subject for a very long time, and a thorough acquaintance with it constitutes an indispensable part of the equipment of every competent psychiatrist. Very little, if anything, that is original or novel is added here, outside of the particular slant that this writer has given to its presentation. It is considered worthy of a restatement by this writer, who has been a student of the subject for over a half century, because the machinery of the criminal law still pays little or no attention to the clinical aspects of the problem as here considered. This article does not deal with the very important practical or theoretical issues that concern the recognition, apprehension, and criminal adjudication of the sex offender. It is to be expected, however, that it contains implicitly, at any rate, suggestions for preventive and therapeutic considerations.

Sigmund Freud, who contributed a great many challenging and pertinent observations on the sexuality of man, spoke of the manifestations of sexuality in the human infant as "polymorphous perverse." This may have been an unfortunate designation, as it undoubtedly offended the sensibilities of the cultural climate of his day and was responsible, to a large extent, for the hostile reactions to his views. Nevertheless, our understanding of the sexual deviations in the adult human being and his behavior, sometimes designated as a sexual offense subject to criminal prosecution, can be best understood, even today, when we consider them as infantilisms that have persisted into adulthood. It might, therefore, be worthwhile to review at this point in some detail Freud's sexual or holophilic theories, even though this has become more or less common knowledge.

We might begin by restating here some of the basic principles that underlie human conduct in all its aspects and that cannot be ignored in any attempt to understand and assess the conduct of any particular individual. These principles were stated with admirable clarity and precision by Masserman in a paper published some years ago.¹ The first principle deals with motivation, and it states in elementary terms that every human being is basically motivated to survive and to propagate. The second principle points out that each human being reacts to the world about

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¹ Masserman, *Mental Hygiene in a World Crisis*, in *BIO-DYNAMICS OF A WORLD MENTAL HYGIENE* (1949).

him not as others view it, but as he himself interprets his surroundings in terms of his own capacities and individual experiences. The third principle reveals that when normal human adaptations are frustrated by external circumstances, man's behavior becomes deviated into substitutive channels, such as fantasy formations, retreats to immature patterns of conduct, or reactive hostilities and regressions. Finally, the fourth principle asserts that when inner strivings become conflictful with each other and so make adequate external adjustments impossible, man's behavior becomes highly deviated, substitutive, regressive, and fantasy-ridden, or as we know it clinically, neurotic or psychotic.

Man being thus basically motivated to survive and to propagate, it might be assumed that each human being leads a dual existence—on the one hand, he is an entity in himself; on the other, an insignificant component of that large entity, his race or species. Accordingly, it is assumed that corresponding to these two roles, he begins life endowed with two great groups of indwelling tendencies, or impulses, or drives, or instincts, if you prefer—the one wholly egoistic or self-preservative, the other essentially altruistic and preservative of the race or species. Of the first group, hunger is the chief sense or sensory representative; of the second, the desire for sexual congress. Careful observation of the manifestations that go with ontogenetic stages in human development will demonstrate that these two great groups of indwelling tendencies lend themselves to a separation of those that might be called "hunger processes" and those that might be termed "sexual processes." Thus, all pursuits pertaining to comfort, shelter, and security would belong to the self-preservative or egoistic drives in pursuit of both proximate or distant goals of satisfaction; while all those wishes that aim at self-adornment and the cultivation of attractiveness would properly be considered to belong to the sphere of sex. The term "sexual" thus acquires a much broader connotation, more of the meaning attributed to the word "love." It certainly was not meant by Freud to be limited to genital functioning as such.

Frink, as far back as 1918, proposed the use of the term "holophilic" instead of "sexual" for designating all kinds of affectional and love manifestations as related to the sexual instincts in the Freudian sense.² The judicious employment of the word "holophilic" in place of "sexual" would serve to avoid some possible misunderstandings. In the realm of law enforcement, particularly, this substitute for the word "sexual" might prove of great importance. Many individuals have been prosecuted and punished, for instance, for voyeurism or exhibitionism, admittedly sources of sexual satisfaction, but involving no genital activity.

The great debate that has been going on for a very long time as to the extent to which psychiatry, especially in its dynamic aspects, can be of assistance in the administration of the criminal law will never be satisfactorily resolved until the law student, from the very beginning of his career, is exposed to and acquainted with the

² H. W. FRINK, *MORBID FEARS AND COMPULSIONS: THEIR PSYCHOLOGY AND PSYCHOANALYTIC TREATMENT* C. 1 (1918).

clinical approach to human conduct. This applies naturally more to those who aspire to work in the field of the criminal law. Let us continue to pursue, then, our inquiry into those basic and indispensable phenomena of life that alone can furnish dependable guides for the intelligent administration of the problems of the sex offender, so called. We shall find in the course of this inquiry that the subject of the sexual life of man is being approached by two radically differing schools of thought—the orthodox Freudian school, which emphasizes the instinctual, unlearned aspects in the evolution and synthesis of the sexual functions; and the adaptational school, which stresses the conditioning and learning features in the sexual synthesis. Let us consider the Freudian view first.

Because the reactions to stimuli that the organism receives usually, if not invariably, represent outputs of energy entirely disproportionate to the amounts of energy impinging on the sense organs—that is, the energy of the stimuli themselves—two sets of instincts were postulated as sources of energy to account for this discrepancy—namely, ego and sexual or holophilic instincts. In Freudian psychology, these are said to furnish the primary push and drive for the two great groups of processes or reactions into which the phenomena of individual life might be divided.

Frink, to whose important work we have already referred, has this to say by way of illustrating what is meant here. If, for instance, a photographic plate in a camera is exposed to the light rays coming from a grizzly bear, an impression is made on the plate that is directly proportionate to the amount of light and the length of time of the exposure. But if these same rays impinge on another sort of sensitized plate, say the retina of a human eye or that of another animal, there results an effect consequent upon fear or flight, the energy output of which bears no definite ratio to the energy content of incoming rays and is of infinitely greater magnitude. The role of the stimulus in this and in practically all other cases is that of releasing into kinetic expression an energy that was latent within the organism. To express this notion of latent energy, the concept of instinct has been introduced and is conceived to be the source of the energy that is liberated in response to various external and internal stimuli. In the case of the holophilic group of phenomena, the term "libido" was given by Freud to the energy thus released. The term "libido" and the complex theory of which it is the symbol has been the subject of much controversy, and some students prefer as a substitute the word "horme," as proposed by Jung.³

The question of latent or stored energy that is subject to conversion into kinetic energy is closely related to the question of instinct in human conduct, concerning which there has been much controversy in the behavioral sciences. It might be well, therefore, to devote some brief discussion to it here, since this article is directed largely to an audience presumed not to be concerned primarily with issues dealt with in the behavioral sciences. The writer is considering here some of the contributions of the

³ Jung, *On Psychological Understanding*, 9 J. ABNORMAL PSYCH. 385 (1914-15).

late Charles Mercier, who dealt with this subject in great detail.⁴ Referring to the organism's inner store of energy, he stated: "The aimless jerkings and sprawlings and crying of the new-born infant are due, or need be due, to no irritation or stimulus from without, but to a liberation of pent-up motion from within." Such movements fall short of acts, it is true. They can scarcely be called purposive, and yet, in a sense, they are purposive. They serve the purpose of getting rid of some of the stored motion that has accumulated to excess.

In the more developed and adult human being, the opening of the eyes on spontaneous waking in the morning, the throwing off of the clothes, and the getting out of bed are due not to a stimulus from without, but to the liberation of motion from within. To the vigorous body, there comes a time when retention of stillness becomes irksome, becomes impracticable and, one might add, nonadaptive. For instance, the writer after several hours at his desk, the traveler after several hours on the train, must rise and stretch his limbs, must get out and pace the platform not because he is excited or attracted to do so by any external allurements, not because he is compelled by any external disturbance, but because motion has accumulated within him to a point of tension that overcomes the resistance opposed to it. No fresh man in the vigor of health can content himself with doing nothing. If there were no such (internal) store of motion (and its accumulation), there would be no conduct, no action. Thus it is true, at the top as well as the bottom of the scale, in man as well as in the amoeba, that the primary initiation of conduct, and the possibility of conduct, is the accumulation within the organism of a store of motion that imperatively demands expenditure.

Mercier wrote at the turn of the century, and the views he held concerning the nature of human conduct must be considered in that light. Nevertheless, they are still valid today with respect to the nature of the economics of energy of the two basic desires of which we spoke earlier. He goes on to say: "Two partial, and as I think, erroneous views of action are in vogue. There is a school which traces all conduct back to a root in reflex action." With this doctrine, Mercier profoundly disagrees. Action has two roots, of which reflex action is but one, and the less important. The mainspring of conduct is not reflex action, but spontaneous action, that expenditure of stored motion that is not elicited by the applications of stimulus, but is the inevitable result of accumulation to a degree of tension that breaks down resistance. There is a large department of conduct, for instance, known as recreative, that owes its origin to the necessity of expending accumulated motion and cannot be accounted for by the stimulus of circumstances.

The other view of action ascribes its origin to volition and finds in the will of the actor a complete explanation of conduct. From this view also, Mercier dissents. From the biological point of view, conduct is the product of two factors, the internal factor and the external factor, and this double origin must be taken into account if

⁴ CHARLES MERCIER, *CONDUCT AND ITS DISORDERS, BIOLOGICALLY CONSIDERED* (1913).

we are to understand the problem we are considering here—namely, the problem of the sex offender.

To quote Mercier again:

We act, and as all acts are movements or arrests or suppression of movements, in order to act we must be able to move, that is, we should have at our command a store of motion susceptible of expenditure. And we act, not *in vacuo*, but in a world of circumstance; and, in order that we may so act, it is necessary to take account of circumstances, it is necessary that we should respond to the impress of circumstances.

Without a store of motion, there could be no movement, and, therefore, no action and no conduct, since conduct is action; without a response to the impress of circumstance, there could be no adaptation of action to circumstance, and, therefore, no conduct, since conduct is the pursuit of ends by modifying circumstances. All action is due to the cooperation of these two and is controlled, guided, varied, and determined by the combination of the internal factor with the external factor. The initiation of action may be due to the internal factor, to the external factor, or to a combination of the two, and the continuance or cessation of action is similarly determined.

Not only may the initiation, continuance, or cessation of action be determined by either the internal or the external factor, or by a combination of the two, but the direction that the action takes may also be determined in either of these two ways, and this leads us to the cardinal distinction between instinctive and reasoned action.

This digression from the basic theme and objective of this article, which we undertook at the point of considering the discrepancy between input (as stimuli) and output (as reaction), was considered justified, even though it might be said to deal with trite matter, in order to help us understand some of the more obscure elements in Freudian theory, upon which a good deal of the criticism of the adaptational school is based.

We shall now go a step further and examine the theory of instinct by the phenomenologist Mercier, upon whom we have already leaned extensively. Let us select one or two examples from the many that he cites in order to validate his thesis of the nature of human conduct. In considering the relation of reasoned to instinctual conduct, he states that as the conduct of animals is not wholly instinctive, but always, at least in its higher manifestations, contains some element of reason, so the conduct of man is not wholly reasoned, but contains always some element of instinct. In the lower animals, the internal factor greatly predominates, and little margin is left for the choice of means to attain the end that the instinct dictates. In man, the reasoned factor encroaches more and more in discovering means to attain his ends, but the ends, the ultimate ends, are always instinctively determined. In contemplating the conduct of man, we are in the habit of regarding mainly the means by which he achieves his ends, and when we take account of purposes, we regard

mainly the proximate and intermediate purposes, which, as well as the intermediate means, may be dictated by reason; and thus we are apt to regard the whole conduct of man as reasoned and neglect those fundamental and underlying purposes that are not reasoned, but instinctive. In truth, and upon close examination, it is found that instinct is no more excluded from the conduct of man by the prevalence of reason than reason is excluded from the conduct of animals by the dominance of instinct.

In lower animals, instinct dictates not only the end, but also, to a considerable extent, the means by which the end is achieved, and leaves but a margin, large or small, to the guidance of reason. In man, instinct dictates the main ends only, and the reasoned margin is so greatly increased that it seems to occupy the whole area; but it does not. The man of science who conducts some prolonged investigation for the solution of a difficult problem—say, in physics or biology—immerses himself in operations of the most highly reasoned character, but these highly reasoned operations are means merely to the attainment of some end that is dictated by some imperious instinct. Is he working for ultimate pecuniary reward? The dictation of instinct is manifest. Does he work for fame? The desire for fame is a high development of that desire for the esteem of one's fellows, which is the common instinctive possession of all men. Does he work for the pure love of investigation and to find out the secrets of nature? Then he is actuated by the same instinct of curiosity that prompts the girl to disarticulate her doll, the boy to rip up the bellows and pull his watch to pieces; that draws the deer to the decoy, the magpie to the jewel, the salmon to the torch, the moth to the lamp.

It would be desirable on this occasion to present more fully Mercier's views on instinct, particularly what he has to say about the fossilization of reason into instinct and the liquidation of instinct into reason. We must, however, return to the examination of the evolution and synthesis of the sexual instinct in man as viewed by orthodox Freudian psychoanalysis. We stated earlier that an understanding of the development of mature sexuality out of the polymorphous perverse state of infantile sexuality is indispensable for a dependable understanding of the sexual deviations and perversities of the adult sex offender.

One of Freud's great achievements was the demonstration that the sexual instinct as first manifested at the time of puberty is not a new characteristic, but a synthetic product, so to speak, formed by uniting certain of a number of holophilic trends or impulses that were present throughout childhood, thus demonstrating that the germs of sexuality are present in the individual from his very birth. When it is remembered that all the receptor surfaces, all the complicated systems of voluntary, sympathetic, and autonomic arcs and end-organs involved in the reactions represented by the love life of the adult are present in practically their fully developed form long before the beginning of puberty, the hostile reactions to Freud's views about sexuality in infants and children cannot be understood on any realistic or scientific grounds. The evidence about the changes at puberty points not to the

introduction of new arcs or to old ones suddenly becoming permeable, but rather to the maturing of certain glands that now begin to pour their internal secretions into the blood stream and in the male furnish a new substance for external discharge. Frink points out that it would be hard to believe all this complicated machinery waited silently and idle, or was responsive only to nonsexual stimuli and capable only of nonsexual reactions during all the years preceding puberty and this new glandular activity. On the contrary, it would be logical to expect the occurrence of many and complicated reactions, lacking, to be sure, something possessed by the sexual processes of the adult, but, nevertheless, fully deserving to be called sexual. By what form of reasoning are we justified in assuming that sexuality develops *de novo* at puberty, rather than that the advent upon the scene of the secretions of certain glands adds further power and emphasis to an already existing complicated machinery of structure and function present from birth and freely reacting before the attainment of sexual maturity.

In Freudian theory, there are three phases to the sexuality of the human being: (1) an infantile or preinhibitory period, which corresponds to the first three or four years of life; (2) the childhood or latency period, which succeeds the first and ends with puberty; and (3) the adult period, sometimes designated as the period of object-love. The criticisms directed at these assumptions by the adaptational school would be less justified and certainly less virulent if it were remembered that the instinctual basis assumed for these developmental phases refers to ends, and not to the means for achieving them. These means or ways of achieving the ends of instinct are adaptational in nature and take into consideration differences of personality and of circumstances.

The sexual or holophilic phenomena of the first period consist chiefly in the pleasurable sensations that the infant derives from the stimulation of certain sensitive areas that are known as erogenous zones. These zones are represented by the oral, anal, and urethral orifices, the penis in the male, and the labia and clitoris in the female. The first pleasurable stimulations from them are incidental to the performing of the functions of alimentation. In the infant, the pleasure derived from the taking of nourishment is not attributable solely to the pleasures of taste and the actual satisfaction of the craving for food; the tactile and kinesthetic sensations created during the act of sucking, too, are distinctly agreeable and pleasurable in themselves. In the same way, the voiding of excrement not only represents the relief from the discomfort of not voiding, but also gives rise to tactile and muscular sensations that have a definite pleasure value in themselves. Having experienced these pleasurable sensations incident to the performing of the alimentary functions, the infant soon seeks to re-experience them for their own sake. The almost universal habit of sucking of the thumb or other objects is well known. Similarly well known, and perhaps as common, is the retention of feces and refusal to empty the bowel when placed upon the toilet until there is an accumulation of sufficient size and consistency to give the act of evacuation the greatest possible amount of pleasure.

The reason these phenomena are classed in the sexual or holophilic group, and not in the class of tendencies that belong to the self-preservative or ego functions, is because of their later history. The orally-centered perversions or perversities of the adult, such as fellatio and cunnilingus, can be understood best as direct descendants of the infantile pleasure-sucking, which in most cases of the adult pervert had been indulged in with great fervor and continued for a long time. In line with the requirements of an adaptational approach, we must postulate in these cases differences in circumstances of the infant's milieu and difference in the makeup of the infant.

But the psychoanalytic study of certain neurotic manifestations in the adult, such as hysterical vomiting and some food idiosyncrasies, are justly looked upon in many instances as reaction formations or defensive maneuvers against similar oral-erotic longings and phantasies that have now become offensive and unacceptable to the controlling trends of the personality. The oral-eroticism of the infant is represented in the normal adult as the pleasure in kissing. Naturally, these rudimentary holophilic activities of the infant cannot be expected to be in every particular like those of the adult. Kissing in the adult excites the genital system, while the sensations excited in pleasure-sucking remain local. Here, the intercommunication of the various holophilic impulses—that is, the sexual synthesis—has not yet been established, for the reason that the glands whose internal secretions are largely instrumental in its accomplishment have yet to mature. Nevertheless, the infantile eroticism as exemplified in pleasure-sucking is not set off as sharply from adult sexuality as one might perhaps expect. In certain rather exceptional cases, at least, it proceeds to an orgasmic climax, succeeded by a period of complete passivity and relaxation, the whole phenomenon bearing such a striking similarity to the sexual acme and immediately subsequent relaxation in the adult that it could hardly escape the observer.

The first stimulations of the penile and clitoral zones appear to result either from irritation produced by discharged secretion or excretion in contact with them, or from the manipulation involved in keeping the child clean. These pleasurable experienced stimulations the infant then seeks to repeat by either thigh-rubbing or the use of the hand. The former seems to be more common in female infants, the latter, in males. All the erogenous zones in infancy have, at least to begin with, about the same degree of pleasure sensibility. As development proceeds, the significance of one zone may be accentuated over that of the others through repeated stimulation, but there is nothing corresponding to the primacy that in the normal adult the genitalia achieve over all other regions of the body. Furthermore, it should be kept in mind that the different zones ordinarily remain perfectly independent of one another; excitement of one does not of itself produce an excitement of heightened sensibility in any of the others, as happens in the adult when, for instance, the oral zone is stimulated and the phenomena of sexual excitement occur in the genitals without their being stimulated directly.

In addition to the zonal components of the holophilic instinct, there appears a little later a set of impulses that have at first no connection with the erogenous areas. These so-called partial impulses go in pairs, of which one is active and the other passive. One of these pairs is the sadistic and masochistic impulse. The former consists of an aggressive tendency and is manifested as a desire to dominate, to use force, roughness, or violence, and if it reaches an extensive degree, to inflict pain. The masochistic tendency has just the opposite nature and is shown as a pleasure in obedience, submission, and the enduring of humiliation or pain.

Another pair of partial impulses consists of the impulse to showing (exhibit) and looking—the former being passive and the latter, active. They refer not only to the genitals themselves, but to the entire body. Out of a union of the looking impulse, with a contribution from the acquisitive trend of the self-preservative group, there arises the curiosity impulse. The impulses to touch and to be touched, etc., belong in the same group of partial desires.

These partial impulses, desires, or perhaps even indwelling needs are readily identified as forerunners of tendencies apparent in the sex life of the normal adult. The sadistic impulse, for instance, corresponds to the normal aggressiveness in courtship shown by the male in comparison with the female, his inclination to master, and occasionally to be rough with the loved object.

It must be pointed out, however, that these partial impulses represent rudiments corresponding not only to tendencies normally present in adult life, but also to those of certain perversions, sadism, masochism, exhibitionism, voyeurism, etc. In fact, there is a perversion corresponding to each one of the partial impulses of infancy. The same may be said with regard to the zonal components. This is the reason that led Freud to designate the infantile sexuality as "polymorphous perverse"—unfortunately so, because there is really nothing perverse about these infantile manifestations at all. True perversion results only when those trends experience a disproportionate development and fail to become subordinated to the genital zone at the time of the sexual synthesis at puberty. The conspicuous feature of the sexuality of the infantile period, however, and for that matter, in the belief of some, of the childhood period also—is that it is predominantly autoerotic. The child gains his satisfaction, for the most part, from his own body; he is not dependent, as is the adult, upon a second person for the satisfaction of his holophilic needs. In the normal adult's love life, the sexual object, this other person, is indispensable; the sexuality of the infant is, for the most part, objectless.

Like most tenets of the Freudian contributions, the above statement should not be taken without some qualifications. The predominance of the autoeroticism in childhood is not absolute. Some observers claim that even as early as the beginning of the second year of childhood, rudimentary manifestations of object-love can be observed that foreshadow, and in a sense are the model for, that great factor in adult life.

This is a restatement, in considerable detail, of observations concerning man's infancy that are common knowledge among those concerned with these issues. These observations have been reiterated in the literature with an endless repetition that at times becomes boresome because of its monotony. And while there still exists some diversity of opinion concerning the meaning of these childhood manifestations—particularly whether they are in a sense preordained, so to speak, or manifestations of an adaptational conditioning, of a learning process—their relationship to future manifestations in adult life has been generally accepted.

For a better understanding of the issues with which we are concerned here—namely, the problem of the sex offender and how to deal more effectively than heretofore with this problem—it is indispensable that we restate here in detail these elements of the drama of acculturation or social-psychological conditioning that constitutes the matrix out of which the grown-up individual evolves. Whether the product will be a socially mature, responsible, and dependable individual, integrated in a stable organization, or whether the opposite of this model of a normal human being will result can still be most reliably predicted from the careful study of these early phenomena of the life of infancy and childhood and the conditions and circumstances under which this early life had been lived. We shall, therefore, continue to deal with this material as though it is addressed primarily and essentially to the student of human behavior, no matter into what sphere of human conduct he is obliged to apply himself.

Thus, the first extra-egoistic holophilic interests of the infant direct themselves to persons in the infant's immediate environment, parents, nurses, etc., but the libido, or holophilic energy, is distributed in unequal quantities to these individuals, so that in normal children, there is soon revealed a preference for the opposite sex. Thus, the little boy loves the mother more than he does the father, while with the little girl, it is the father who is the preferred love-object. Quite generally and very early, the parent of the same sex as the child is looked upon as an interferer and a rival for the affections of the parent more greatly loved. The little boy, for instance, wishes that his father were out of the way so that he could have his mother all to himself. Sometimes, the irksome presence of the father generates a wish for his death, but this idea does not generate the horror that it does in the adult because in the child, the idea of death is equated with the idea of "gone away." This early object-selection forms the foundations for those important constellations—namely, the Oedipus complex in the male and the Electra complex in the female, which in the eyes of the unbiased observer are of great significance not only in the later life of the neurotic, but in that of normal people as well, and have been designated the "nuclear complexes."

In these alloerotic phenomena, as distinguished from the essentially autoerotic processes that constitute the major portion of the infantile holophilic reactions, the nearest approach is made to the phenomena of love in the adult. The essential difference is the lack of synthesis of the various impulses into any definite pattern or

hierarchy such as exists in normal adult life. That is to say, all the impulses remain as separate and independent sources of pleasure; the significance of the genital zone is not, as in the case of the normal adult, accentuated over that of all the others, and the partial impulses are not intimately connected with it. For instance, in the adult, the gratification of one of these partial impulses—say, the desire to touch the love-object—although in itself a source of pleasure, creates in addition a desire for greater pleasure, that of coitus. Thus, the two stand in relation to each other of forepleasure and endpleasure. In infancy, there is no differentiation into pleasures of different order. All the holophilic pleasures are endpleasures, and whatever organization that may exist among the various impulses is a pregenital organization. The several pleasures of this period are, for the most part, lacking in the genital component, unless the genitals are directly stimulated.

Because of what has been said about the Oedipus and Electra complexes and the heterosexual nature of the child's first object-libidinal stirring, it should not be assumed that all the child's holophilic interest is directed towards the opposite sex. On the contrary, a bisexual, or, to use Ferenzi's term an "amphierotic" tendency is apparent. Some of the libido takes a homosexual direction, being applied (in the boy) to the father, brothers, or other males in the family. This homoerotic, homophilic, or homosexual direction of the libido in infancy corresponds to the normal friendships and attachments for one's own sex in the normal adult, and, in the abnormal, to the homosexual perversion.

These holophilic trends and activities of the infantile period reach a high point somewhere between the third and fifth years of life. Then, there begins a period of latency relatively complete in some individuals, but broken through in various degrees of expression of sexuality in others. The period of latency is initiated by the first appearance of such reactions as shame, modesty, disgust, sympathy, etc. They are the foundation and forerunners of all those ethical and esthetic trends that play the role of inhibitions upon the later sexual life and, like dikes or dams, narrow the avenues of holophilic expressions. The first appearance of these inhibitory tendencies is spontaneous, and if we look upon the idea that ontogeny recapitulates phylogeny as in some sense valid, these early reactions to the infantile preinhibitory holophilic manifestations may have some roots in the organic aspect of the maturation process. The further development and intensification of these inhibitory trends, however, depends in great measure for their extent and direction upon the culture and educational influences of the environment. The adaptational explanations of the important happenings during the latency period have to be considered in the light of Freud's remark that education remains properly within its assigned realm only if it strictly follows the path sketched for it by the spontaneously-appearing inhibitory tendencies and limits itself to emphasizing and developing these. We know from clinical observation of those instances where the well-meant educational and corrective efforts of parents overstepped the limits indicated by the spontaneous inhibitions and

went too far in some directions, thus producing an ultimate effect upon the child that was very different from the beneficial one intended.

The controlling forces that are thus shaped by educational and training influences and that eventuate in an apparent, more or less complete disappearance of the infantile sexuality as manifested in the first period are, in large measure, developed at the expense of the infantile sexuality and derive much of their motive power from it. For instance, the masochistic partial impulse furnishes the motive for obedience and leads the child to accept and to embody into his own personality the codes or standards of those about him. Similarly, the exhibitionistic impulse, manifested at first in the desire to have the body looked at, later expresses its energies in whatever action may serve to win parental approbation and praise. In other words, the energy of these impulses may eventually lead the child to avoid acts by which he gratified them originally. In this manner, the control and suppression of the primitive infantile sexuality is, in large part, accomplished by motives derived from the infantile sexuality itself.

Evidence emerges also of the capability of the libidinal energies to become modified, redirected, and subject to quantification. The libido directed toward the members of the family or other persons of the environment tends more and more to be displaced from the sexual aims of the first period and to depart from manifestations coinciding with the popular meaning of the word "sexual," taking on an aspect that coincides with the meaning of the word "love" in its narrow sense—that is to say, affection. The love of the mother thus loses whatever crassly sexual appearance it might at first have possessed, while the infantile hostility and jealousy exhibited towards the father may disappear from view entirely or be represented only as a diffuse inclination to disobedience, dislike of authority, etc. In other words, the manifestations of the Oedipus complex undergo a profound amelioration.

This refining process, through which the energies of the primary components of the sex drive are divorced from their original aims and are now being applied to new aims and activities of a higher and socially more valuable order, is not limited to the formation of controlling or inhibiting trends as just described, which, in large measure, represent the basis for estheticism and morality; it also occurs in other connections. The primitive sexual curiosity thus becomes a desire for general knowledge; the sadistic impulse finds expression in self-assertiveness and as a desire to win or excel in games, sports, or any other sort of competition, etc. Such employment of the primitive energies for higher aims is known as sublimation.

The latency period, as has been said, is by no means always complete, and in many individuals, it is occasionally or even constantly broken through by some form or other of definitely sexual manifestations. In children in whom this takes place extensively, it often may be interpreted as the foreshadowing of a later neurosis or sexual abnormality.

A wholly normal suspension of latency manifestations occurs with the onset of puberty, and with it, the latency period is terminated. The holophilic instinct

now changes from its infantile to its adult form. Hitherto, its manifestations have been predominantly autoerotic; now, begins the predominance of object-love. Hitherto, the various partial impulses and zonal pleasure sources existed, for the most part, side by side in a sort of democratic equality; now, they become organized into a hierarchy. The genital zone acquires a primacy over all the other components of the holophilic impulse, or drive, or instinct, and under normal conditions, everything else is subordinated to this primacy of genitalism. The partial impulses, looking, touching, sadistic aggression, etc., and their passive counterparts, and the oral or other zones still susceptible to sexual stimulation now fall into the subordinate role of forepleasure sources of gratification, and the entire forepleasure machinery now serves the unified purpose of preparing for and urging towards the final holophilic act through which sexuality becomes articulated with the function of procreation in the endpleasure of coitus. Autoerotism, although in most cases holding its ground for a time in the form of the masturbatory activities that ordinarily appear about the time of puberty, is gradually replaced by the new regime of object-love.

Under normal circumstances, libido is eventually withdrawn from its affectionate fixation upon members of the family and their surrogates, and charged with the new qualities of glandular influence, it is at length transferred to extrafamilial individuals of the opposite sex with whom, as foreshadowed in the masturbation fantasies of puberty, a complete love life can eventually be carried out. Only with the complete synthesis that takes place at puberty do the normal differences between the sexuality of the male and the female come into high relief. The active or aggressive trends come to predominate in the character of the male; the passive, in the female. Incidentally, it may be remarked that the change at puberty from infantile to adult sexuality is more sharply marked and more sudden in the male than in the female. The love life of the female retains in perhaps most cases a good deal of the character of infantile sexuality all through adolescence and quite often well into or even throughout adult life.

This sketch of what is considered in orthodox psychoanalytic psychology the formal ontogenesis of the holophilic or sexual instinct in man is an indispensable prolegomenon to an understanding of the many ways in which there may occur in the sexual life of man the distortions, deviations, and perversities that constitute the raw material of the potential sex offender, legally considered. Every step in the ontogenetic development of sex in man, every transition that must be passed through, offers possibilities of morbid disturbance, through a persistence of this or that phase that should have normally been passed, through the opening up of avenues of aberrant development, or through the formation of a *locus minoris resistentiae*, or weak spot, at which the apparently normally accomplished sexual synthesis may give way under the strain and stress of adult life.

SEX OFFENSES: THE MEDICAL AND LEGAL IMPLICATIONS OF SEX VARIATIONS*

KARL M. BOWMAN† AND BERNICE ENGLE‡

I

INTERSEXUALITY

A. Genetic Sexual Determination

When a new individual is formed, heredity and other factors may play a role in producing sexual malformations.¹ Within the past few years, there has been a considerable breakthrough in our knowledge of human genetics, and findings that are in many ways quite revolutionary have given us new and valuable insights in this area and have even changed some of our basic ideas. This body of knowledge, however, is continuing to expand, so that currently-held views must be regarded as only tentative at best and subject to further change as additional discoveries are made.

The human body is composed of cells; these combine to form organs; these, in turn, combine to form systems, such as the reproductive, respiratory, and digestive systems; and these, then, combine to form the individual. Cells differ in structure and function, but all cells contain chromosomes. Thirty-three years after the problem of human chromosome number was considered to be solved—that is, forty-eight had generally been accepted as the number of chromosomes in every human cell, except the sperm and the ovum—investigators examining some human cells in 1956 were “surprised to find that the chromosome number 46 predominated,”² a finding that has since been substantiated by others.³ These forty-six human chromosomes exist in the

*The authors wish to acknowledge helpful suggestions from the following: Dr. Roberto Escamilla, Dr. Gilbert S. Gordan, Jr., Dr. Hans Lisser, and Professor Curt Stern, sources for several references in this article.

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‡A.B. 1914, M.A. 1929, University of Kansas. Research Associate, Langley Porter Neuropsychiatric Institute. Formerly Member, California Sexual Deviation Research; Member, Biomechanics Research Project, University of California Medical Center. Author, [with D. C. Lewis Nolan] *WARTIME PSYCHIATRY* (1954); [with A. E. Bennett & E. A. Hargrove] *PSYCHIATRY IN GENERAL HOSPITALS* (1956). Contributor to psychiatric publications.

¹The explanation that follows has been simplified to facilitate comprehension by the nonmedical specialist. For more detailed treatment of the subject, see RICHARD GOLDSCHMIDT, *THEORETICAL GENETICS* 6, 424 (1955); S. LEONARD SIMPSON, A. STUART MASON & G. I. M. SAWYER, *MAJOR ENDOCRINE DISORDERS* 294 (1959); Jost, *Embryonic Sexual Differentiation (Morphology, Physiology, Abnormalities)*, in H. W. JONES & W. W. SCOTT (Eds.), *HERMAPHRODITISM, GENITAL ANOMALIES AND RELATED ENDOCRINE DISORDERS* 15 (1958); Ford & Hamerton, *The Chromosomes in Man*, 178 *NATURE* 1020 (1956); Stern, *The Chromosomes of Man*, 11 *AM. J. HUMAN GENETICS* 301 (1959).

²Tjio and Levan, quoted by Stern, *supra* note 1, at 302.

³Ford, Jacobs & Lajtha, *Human Somatic Chromosomes*, 181 *NATURE* 1565 (1958).

form of twenty-three pairs. Ordinarily, in the female, the twenty-third pair of cells consists of two X chromosomes; in the male, however, the last pair consists of an X and a Y chromosome.

A new individual is conceived when two germ (sex) cells—an ovum from the female and a sperm from the male—unite. Each of these two germ cells is formed by the process of meiosis, or reduction division, in which the germ cell, which initially contained forty-six chromosomes, goes through various dividing processes until it has only twenty-three chromosomes, or half its original number. Each normal ovum contains an X chromosome, and each normal sperm contains an X or a Y chromosome in equal proportions. Ordinarily, when a sperm containing an X chromosome unites with an ovum, the zygote (fertilized ovum) will contain an XX pair of chromosomes and will develop as a female. If the sperm contains a Y chromosome, the zygote will contain an XY pair of chromosomes and will develop as a male. There has been a great deal of controversy about the roles of the X and the Y chromosomes in determining sex—whether female sex is determined by two X chromosomes or by the lack of a Y, or whether male sex is determined by another pair of chromosomes called the Z somatosomes. On the basis of recent findings,⁴ however, "it has now been established, in Man and the mouse, that the Y chromosome determines maleness."⁵

The developing embryo remains sexually undifferentiated for about forty-two days.⁶ Normal sex differentiation, which commences shortly thereafter, is determined at the time of conception by genetic sex.⁷ Since both the female and male gonads (primary sex glands) originate from an identical primitive gonad, its cortex (outer layer) can develop into an ovary in the female, or its medulla (center) can develop into a testis in the male. During this early stage, at about the fifth or sixth week, two sets of ducts, Wolff's and Müller's, also appear in the embryo. The former can develop into the sperm duct, consisting of the epididymis, vas deferens, and seminal vesicle in the male, or the latter can develop into the fallopian tubes, uterus, and upper vagina in the female. At about nine weeks in the development of the normal male embryo, and slightly later in the female, the appropriate duct continues to develop and the other one retrogresses. Sex differences of the embryo's external genitals are recognizable at about two months,⁸ and this development ordinarily is well underway at three months in the female fetus and at four months in the male.⁹

⁴ Jacobs & Strong, *A Case of Human Intersexuality Having a Possible XXY Sex-Determining Mechanism*, 183 NATURE 302 (1959); Welshons & Russell, *The Y-Chromosome as the Bearer of Male Determining Factors in the Mouse*, 45 NAT'L ACAD. SCI. PROC. 560 (1959).

⁵ Stern, *supra* note 1, at 311.

⁶ Grumbach & Barr, *Nuclear Sex in Sexual Anomalies*, in 14 G. PINCUS (ED.), RECENT PROGRESS IN HORMONE RESEARCH 255 (1958).

⁷ Grumbach, *The Sex Chromatin Pattern and Human Sexual Anomalies*, in G. GORDAN (ED.), YEAR BOOK OF ENDOCRINOLOGY 281 (1959).

⁸ Grumbach & Barr, *supra* note 6, at 271.

⁹ Jost, *supra* note 1, at 33.

Several factors can interfere with normal sexual development. On a genetic basis, a defect in the germ plasm may cause anomalies, some of which are manifested as early as the second or third month of gestation. Thus, for example, a gene inherited from the mother may cause hyperfunction of the adrenal gland in the fetus. Certain other factors, such as German measles, x-ray or hormone treatment, and ovarian tumors of the pregnant woman may also affect fetal development. After birth, too, several poorly understood conditions may produce abnormalities. Thus, the child may be sexually precocious or retarded. Or abnormal hormonal conditions may cause a partial transformation from one sex into the other—as, for example, in virilism in the young girl. Or the individual may exhibit some of the characteristics of both sexes, so that it is difficult to decide to which he or she actually belongs—the so-called pseudohermaphrodite. Or the individual may be born with functioning gonads of both sexes—the true hermaphrodite, who, however, is never a fully developed person of either sex.

Accordingly, attempts have been made to discover some simple absolute criteria by which the sex of an individual may genetically be determined. In the course of this search, a special material called the chromatin mass has been found in the nuclei of normal female cells that will absorb a dye visible under microscopic examination in forty or more per cent of the cells, with an average of seventy-two per cent in any one series.¹⁰ This chromatin mass is found in few or no nuclei of normal male cells, depending on the tissue examined. If this chromatin mass is found, the cells are called chromatin-positive; if no chromatin mass is found after examination of at least 100 cells, the cells are called chromatin-negative.¹¹ Another test that has attracted some attention is based on the presence of a drumstick-shaped mass in the nuclei of some polymorphonuclear leukocytes (white blood cells), which supposedly is found only in normal female cells. But recent studies have thrown considerable doubt on its reliability in determining the sex chromatin patterns in other tissues.¹² The most reliable test of genetic sex is the actual viewing of the chromosomes—a very difficult procedure.

B. Sexual Anomalies

1. *True hermaphroditism*

The misidentification of the sex of a newborn infant is most commonly attributable to the fact that the individual is either a true hermaphrodite or a pseudohermaphrodite.¹³ In true hermaphroditism, the individual has both functioning testicular and functioning ovarian tissue. He may have (1) either one or two gonads with functioning testicular and ovarian tissue (ovotestis), (2) an ovotestis on one

¹⁰ Grumbach & Barr, *Nuclear Sex in Sexual Anomalies*, in 14 G. Pincus (Ed.), *Recent Progress in Hormone Research* 255, 257 (1958).

¹¹ Moore, *Cytological Diagnosis of Chromosomal Sex in Man*, 29 U. MANITOBA MED. J. 35 (1957-58).

¹² Grumbach, *The Sex Chromatin Pattern and Human Sexual Anomalies*, in G. Gordan (Ed.), *Year Book of Endocrinology* 281, 282 (1959).

¹³ True hermaphroditism is defined by a few to mean that the individual has active sperm and egg cells. To the knowledge of the writers, no such case has ever been reported.

side and an ovary or testis on the other, or (3) a testis on one side and an ovary on the other.¹⁴

The true hermaphrodite may be predominantly male or predominantly female, and he may have the rudiments or the fully developed internal and external genitals of both sexes.¹⁵ There may be a shortened penis with an abnormally placed urethral opening, usually on the underside at a varying distance from the tip (hypospadias), although it may be thought of at times as an enlarged clitoris with an urethral opening at its base. A rudimentary vagina and uterus may be present, although the orifice may be closed. There may be a scrotum and a testis may have even descended into it, although frequently it is bifurcated and the gonads are undescended. A report of two true hermaphrodite children in one family and other similar reports support genetic theories about the cause of this condition.¹⁶

The true hermaphrodite is not clearly of one sex or the other. Historically, in many countries, such individuals were allowed to decide to which sex they wished to belong and then were forced to adhere to this decision. The common-sense way of dealing with this problem, however, is for a physician to consult with the parents to decide which physical and psychic sex the individual resembles more closely and then, by surgery and endocrine treatment (administration of sex hormones), help the individual develop as far as possible as a member of that sex.¹⁷

2. Female pseudohermaphroditism

Pseudohermaphroditism, a condition in which the individual has the gonads of one sex but seemingly has the external genitals and other physical characteristics of the opposite sex, is a product of a number of still little-understood factors. More is known about female pseudohermaphroditism, in which a female with ovaries exhibits some male characteristics.¹⁸ The most common cause of this condition is hyperdevelopment of the fetal adrenal cortex, which produces an excessive secretion of androgens (the so-called male sex hormones). Another cause, already mentioned, is a hormone-producing ovarian tumor in the mother, who transmits her excess androgens to the fetus. Endocrine treatment of the mother during pregnancy, too, may result in masculinization of the fetus for the same reason. And finally, the fetus itself, for unknown reasons, may not develop normal sex organs.

Female pseudohermaphroditism due to adrenal cortex hyperactivity results in the progressive virilization of the female. Since the virilizing process progresses at different rates in different individuals, the infant may or may not be recognized as

¹⁴ FRANK HINMAN, *PRINCIPLES AND PRACTICE OF UROLOGY* 134 (1935).

¹⁵ HANS LISSER & ROBERTO ESCAMILLA, *ATLAS OF CLINICAL ENDOCRINOLOGY* 333 (1957).

¹⁶ Milner, Garlick, Fink & Stein, *True Hermaphrodite Siblings*, 79 *J. UROL.* 1003 (1958); Brewer, Jones & Culver, *True Hermaphroditism*, 148 *A.M.A.J.* 431 (1952). See also Clayton, Smith & Rosenberg, *Familial True Hermaphroditism in Pre- and Postpuberal Genetic Females*, 18 *J. CLIN. ENDOCRIN. & METAB.* 1349 (1958).

¹⁷ See notes 42-45 *infra* and accompanying text.

¹⁸ Grumbach, *The Sex Chromatin Pattern and Human Sexual Anomalies*, in G. GORDAN (ED.), *YEAR BOOK OF ENDOCRINOLOGY* 281, 284 (1959).

a female at birth. As virilization proceeds, however, the clitoris enlarges and comes to resemble a penis; body hair appears early, and at puberty, the voice deepens and a beard develops, the body build becomes muscular and masculinized, and such feminine characteristics as breast development and menstruation never appear.¹⁹ Reports of congenital virilization due to adrenal cortex hyperactivity in identical twins support genetic theories about the cause of this condition.²⁰

For a number of years, female pseudohermaphrodites were treated by operation and endocrine therapy to help them develop into as complete males as possible.²¹ With the discovery of cortisone, which halts the hyperactivity of the adrenal cortex, however, virilism can be arrested if treated in its early stages and the individual can develop into an essentially normal female.²²

3. *Male pseudohermaphroditism*

In male pseudohermaphroditism, sometimes called testicular feminization, individuals with testes may develop feminine characteristics in varying degrees. In the mildest cases, a small penis is present and some degree of breast development occurs at puberty.²³ In the extreme cases, however, the individual appears as a normal, but nonmenstruating, woman—often being raised as such²⁴—with well-developed breasts, female external genitals, a vaginal canal (usually a blind pouch), and frequently, sperm ducts. This condition is produced by a hypersecretion of estrogen (the so-called female hormone) by the testes in the abdominal cavity. Its high familial incidence, in both the mild and the extreme form, suggests that this is a genetically-determined disorder.²⁵

Treatment of male pseudohermaphroditism will depend on a variety of factors. Some authorities recommend removal of the gonads, since in about fifteen per cent of the cases, they become malignant.²⁶ In mild cases, if the individual is not very feminized and has been raised as a male, castration is supplemented by endocrine treatment in order to increase masculinization. In extreme cases of essentially feminine individuals who have been raised as females and who wish to remain such, however, attempts should be made by surgery and endocrine treatment to aid de-

¹⁹ LISSER & ESCAMILLA, *op. cit. supra* note 15, at 240.

²⁰ Schneeberg, Steinberg, Malen, Chernoff & Yap, *Congenital Virilizing Adrenal Hyperplasia in Identical Twins*, 19 J. CLIN. ENDOCRIN. & METAB. 203 (1959).

²¹ Hinman, *Advisability of Surgical Reversal of Sex in Female Pseudohermaphroditism*, 146 A.M.A.J. 423 (1951).

²² LISSER & ESCAMILLA, *op. cit. supra* note 15, at 246.

²³ Grumbach & Barr, *Nuclear Sex in Sexual Anomalies*, in 14 G. PINCUS (Ed.), *RECENT PROGRESS IN HORMONE RESEARCH* 255, 292 (1958).

²⁴ Goldberg & Maxwell, *Male Pseudohermaphroditism Proved by Surgical Exploration and Microscopic Examination: A Case Report with Speculations Concerning Pathogenesis*, 8 J. CLIN. ENDOCRIN. & METAB. 367 (1948).

²⁵ Morris, *The Syndrome of Testicular Feminization in Male Pseudohermaphrodites*, 65 AM. J. OBSTET. & GYNECOL. 1192 (1953). See also Jacobs, Baikie, Court Brown, Forrest, Hugh, Stewart & Lendon, *Chromosomal Sex in the Syndrome of Testicular Feminisation*, 2 LANCET 591 (1959).

²⁶ Morris, *supra* note 25. See also Wachstein & Scorza, *Male Pseudohermaphroditism: A Type Showing Female Habitus, Absence of Uterus and Male Gonads Often Associated with Testicular Tubular Adenoma: Report of a Case and Review of the Literature*, 21 AM. J. CLIN. PATH. 11 (1951).

velopment into as normal a female as possible. Although some question might conceivably be raised about the legality of this latter course, no judicial decisions in point have been found. In any event, however, common sense and good medicine would seem to indicate that the individual's wishes be considered and that measures be taken to enable him to be as normal a person of the desired sex as possible.

4. Klinefelter's and Turner's syndromes

Two other conditions may cause some question concerning an individual's sex, and the possibility of true sex reversal has been raised. The well-recognized manifestations of Klinefelter's and Turner's syndromes are examples of what used to be considered true sex reversal. Only within the last year, owing to an improved method for viewing chromosomes, has it been possible better to understand the basis of these syndromes. It is now known that the chromatin-positive form of Klinefelter's syndrome and the chromatin-negative form of Turner's syndrome result from chromosomal abnormalities. In the few cases extensively studied so far, chromatin-positive individuals with Klinefelter's syndrome have been found to have forty-seven instead of the normal forty-six chromosomes, and those with chromatin-negative Turner's syndrome have been found to have forty-five chromosomes.²⁷

In Klinefelter's syndrome, the individual is a sterile male, although in four cases of the chromatin-positive form, very small numbers of spermatozoa have been found in the seminal fluid.²⁸ Frequently, he develops gynecomastia (breast enlargement), with breasts not unlike those of a woman, and his testes are small. He is commonly able to have a normal sex life, however; in fact, some individuals with this syndrome have been discovered only because they sought medical advice concerning their infertility.

Since about seventy per cent of those afflicted with Klinefelter's syndrome are chromatin-positive,²⁹ it was hypothesized that they had begun to develop as females, but had been changed during intrauterine life to imperfect males. But the most recent studies indicate that this syndrome rather results from the chromosomal variation already mentioned; the afflicted individual has forty-seven chromosomes, and instead of having an XY sex chromosome pair as the twenty-third pair, he has an XXY combination. In the light of this finding, that this syndrome in most cases is caused by an additional X chromosome, the individual with this condition is now no longer considered as an example of sex reversal, but as one who has always been a male. He has not developed perfectly because of a chromosomal abnormality and can be compared to a person born with an abnormality as a harelip or a cleft palate.

Legally, there should be no question that such an individual is a male; and psycho-

²⁷ Ford, *Chromosome Unbalance and Abnormal Development in Man*, 6 NEW SCIENTIST 405 (1959).

²⁸ Ferguson-Smith, Lennox, Mack & Stewart, *Klinefelter's Syndrome, Frequency and Testicular Morphology in Relation to Nuclear Sex*, 2 LANCET 167 (1957). See also Stewart, Ferguson-Smith, Lennox & Mack, *Klinefelter's Syndrome: Genetic Studies*, 2 LANCET 117 (1958).

²⁹ Grumbach & Barr, *Nuclear Sex in Sexual Anomalies*, in 14 G. PINCUS (ED.), RECENT PROGRESS IN HORMONE RESEARCH 255, 265 (1958).

logically, it is important for the individual and others to consider him as such. Treatment sometimes consists of a mastectomy (removal of breast tissue) and endocrine treatment, since the testes are frequently underdeveloped.

Turner's syndrome is a condition found in females whose ovaries have failed to develop and who fail to menstruate or to develop secondary sex characteristics (breast development and pubic hair growth). The syndrome is often associated with other congenital abnormalities such as small stature, malformation of fingers and toes, heart disease, webbed (short thick) neck, and others. These females are always sterile.

A chromatin-negative pattern for about eighty per cent of such cases has been estimated.³⁰ The condition has been described as the inverse situation of Klinefelter's syndrome: the individuals are essentially female, and yet the majority lack sex chromatin. It is stated that the chromosomal makeup in those afflicted with chromatin-negative Turner's syndrome is probably XO rather than XX; the individual lacks a chromosome, and instead of having the normal complement of XX, she has only one X. Development is complicated by abnormal sex differentiation in the developing embryo. It has been emphasized, however, that "the XO patient should not be referred to as an instance of 'sex reversal,' as a 'chromosomal male,' or as a 'genetic male': she is a female, with an abnormal genotype."³¹

Physiologically, the main treatment is the cyclic administration of estrogens to stimulate the development of secondary sex characteristics and to produce uterine bleeding resembling menstruation. A few individuals with this condition have spontaneously menstruated, but most do not.

Klinefelter's and Turner's syndromes should be regarded as examples of imperfectly formed males and females, respectively, and those afflicted with them should be looked upon as true members of their sexes, not as sex transformations. There is no law regarding these conditions, as far as can be determined.

5. Metafemale

Another condition caused by a chromosomal abnormality only recently identified in a woman is that of the so-called "superfemale," which also occurs in the fruit fly. In the reported case, the thirty-five-year-old woman was sexually underdeveloped, had forty-seven chromosomes, and an XXX sex chromosome pattern. She had stopped menstruating at age nineteen, had infantile external genitals, underdeveloped breasts, and a high (seventy-one per cent) proportion of chromatin-positive cells. In addition, she was of below average intelligence.³² It has been suggested that the term "super female" has been inappropriate when applied to the fruit fly and is now

³⁰ *Id.* at 278.

³¹ Ford, Jones, Polani, De Almeida & Briggs, *A Sex-Chromosome Anomaly in a Case of Gonadal Dygenesis (Turner's Syndrome)*, 1 LANCET 711 (1959).

³² Jacobs, Baikie, Court Brown, MacGregor, MacLean & Harnden, *Evidence for the Existence of the Human "Super Female"*, 2 LANCET 423 (1959); *Human Chromosomal Abnormalities*, 2 LANCET 448 (1959).

inappropriate when applied to the human because of its erroneous connotations. It has been proposed that the term "metafemale" (meta = beyond) be used instead in both the human and the fruit fly, since it would not only describe the appearance of the afflicted individual as beyond normal, but would avoid the implication that an XXX individual is at least genetically more female than an XX individual.³³

6. Sexual precocity

"True" sexual precocity has been described in a little girl as when she "has developed into a woman, with adult secondary sex characteristics and periodic menstruation," and in a little boy as when he "has the appearance of a man, both as to the external genitalia and as to the secondary attributes of beard growth and pitch of voice."³⁴ The age below which puberty is considered precocious has been defined as nine or ten for both sexes, since girls in North America reach puberty between nine and sixteen years of age, and most boys, between ten and seventeen years of age. The cause in most cases is unknown, and the condition is referred to as idiopathic, or a primary disease, a term used in medicine to indicate ignorance of a cause. Hereditary factors and brain (hypothalamic) tumors can produce sexual precocity in both sexes; other known causes are tumors of the ovary in girls and tumors of the testis, adrenal cortex, or the pineal (a small gland near the central part of the brain) in boys.

Sexually precocious little girls grow rapidly and early develop breasts, sexual hair, and mature internal and external genitals.³⁵ They may have some vaginal bleeding at age six months, and at as early as five years of age, they may menstruate and ovulate (produce ova or germ cells). One of the most famous cases on record is that of a Peruvian girl who began menstruating at eight months and who gave birth by Caesarean section at five-and-a-half years of age, to a six-pound boy.³⁶ Most of these girls do not seem to be overly interested in sex, and a series of case histories indicates that, by and large, their sex drive seems to be the same as that for other girls of the same age.³⁷ As they mature, they become normal individuals who have simply been precocious in their sexual development; and as adults, they are no different from other women.

In boys as in girls, rapid body growth occurs early, sexual hair develops, external genitals achieve adult proportion, the voice becomes deep and masculine, and acne is fairly common.³⁸ Erections and nocturnal emissions occur, and spermatogenesis (production of sperm) may or may not be present. Most reports state that these

³³ Stern, *Use of the Term "Super-female,"* 2 LANCET 1088 (1959).

³⁴ Lissner & Reilly, *The Gonads*, in G. GORDAN & H. LISSNER (EDS.), *ENDOCRINOLOGY IN CLINICAL PRACTICE* 255 (1953).

³⁵ HANS LISSNER & ROBERTO ESCAMILLA, *ATLAS OF CLINICAL ENDOCRINOLOGY* 341 (1957).

³⁶ Escamel, cited by Lissner & Reilly, *The Gonads*, in G. GORDAN & H. LISSNER (EDS.), *ENDOCRINOLOGY IN CLINICAL PRACTICE* 255, 257 (1953).

³⁷ Hampson & Money, *Idiopathic Sexual Precocity in the Female: Report of Three Cases*, 17 *PSYCHOSOM. MED.* 16 (1955).

³⁸ Lissner & Reilly, *The Gonads*, in G. GORDAN & H. LISSNER (EDS.), *ENDOCRINOLOGY IN CLINICAL PRACTICE* 255, 261 (1953).

children are not hypersexual in the sense that they are sexually aggressive and constantly seeking sex partners or that they masturbate excessively.⁸⁹

Raising these children in a normal atmosphere is sometimes very difficult. The sexually precocious boys become objects of curiosity for all the rest of the children. Mothers of little girls are likely to become terrified at the idea of their daughters' exposure to a "sex fiend." The public school teacher may be very disturbed at having to work with a small boy who is apparently a sexual adult. The fact that these individuals grow rapidly and mature sexually causes everyone to treat them as though they were much older than they actually are, thereby creating many difficult problems for them. The following case illustrates some of these problems.

A fraternal twin boy, with a normal sister, began his sexual development early. At one year, his genitals were enlarged; at twenty-six months, pubic hair was noted; and at two and a half years of age, both penis and testes were overdeveloped. At thirty-two months of age, he was admitted to a university hospital for a two-week study, at which time he was found to be well above average in height and weight for a boy of his age, and, apart from his sexual precocity (for which no cause could be determined), physiologically normal, although below average mentally.

His father had left the home when the boy was five years old, and his mother felt she could not handle him because of his aggressiveness and strength. He had been accused of making sexual advances, although the episodes involved only his being discovered in an alley lifting up the dresses of two girls his own age and a vague, unsubstantiated reference to his having done or said something regarding a neighbor's breasts. Because of neighborhood pressure, his mother built a fence around a four-foot by ten-foot yard, in which she confined the boy for six months. She sought help from several social agencies, and when the school refused to keep the boy because of his boisterousness, the mother applied to the court for his commitment to an institution, which petition was granted.

At the age of six and a half, the patient was again found to be physically normal except for his sexual precocity and his bone and hormonal ages, which were well into adolescence. He was given psychological tests, and although his IQ was still substantially below normal, the examiner emphasized that his performance in some areas was quite good and that his retardation could be a result of his earlier enforced isolation rather than true mental deficiency. While he was in the institution, he learned to write his name, a skill his normal twin-sister had not yet acquired.

The boy, a lively, boisterous, and sometimes destructive child, improved in his relationships with the doctors and other personnel, probably as the result of psychotherapy. Even at the hospital, however, he was sometimes treated more like an adolescent than a six-and-a-half year old boy. After some time, his mother decided to take him home to live with her, his aunt, and his sister. At the latest report, he was attending school, apparently with success.

⁸⁹ Money & Hampson, *Idiopathic Sexual Precocity in the Male: Report of a Case*, 17 *PSYCHOSOM. MED.* 1 (1955).

It must be emphasized that while sexually precocious children may look like adolescents, they are, nevertheless, still children and must be treated as much like other children as possible. They are not usually oversexed, but merely prematurely developed; nor are they sex maniacs. Although they are larger than other children of their own age while they are young, by puberty, their growth will have stopped because of early calcification of growth centers in their arms and legs, which are short in relation to their bodies. By about the age of eighteen, they are actually shorter than most boys and girls of their age. If such children are handled intelligently and sympathetically during the period of their sexual precocity, they will probably become normal, although short, adults. The importance of such treatment cannot be over-emphasized.

7. Eunuchoidism

A group of individuals, both male and female, are imperfectly developed sexually and at puberty, fail to develop the normal secondary attributes of their own sex. One of the most frequent causes of this condition is a failure of the pituitary gland to secrete the sex-stimulating hormones. Another cause is the failure of the gonads to function normally. The condition occurs occasionally in families, but in some cases, it is not known whether the defect was of the gonads or of the pituitary gland.

In males afflicted with this condition, the penis is commonly very small, and many show marked growth in their long bones (arms and legs), so that a form of gigantism occurs. In females, the infantile vagina and uterus fail to mature, other sex characteristics do not develop at puberty, and many are tall and continue to grow beyond the normal age, although not demonstrating gigantism.⁴⁰

Five instances of eunuchoidism in two families have been reported in which endocrine treatment was successful in inducing genital development and the development of secondary sex characteristics.⁴¹ In girls as well as boys, almost normal maturation can occur, although infertility persists if the condition is severe.

C. Criteria for Sex Determination

Seven variables affecting sex determination have been defined by some authorities.⁴² First, there is chromosomal sex, determined by examination of the actual chromosomes or by the chromatin mass test, described above, which presumably indicates how the individual originally started out. Studies of twelve true hermaphrodites show that eight had a chromatin-positive and four a chromatin-negative pattern.

The second criterion is gonadal sex. Some might assume that if an individual had

⁴⁰ HANS LISSER & ROBERTO ESCAMILLA, *ATLAS OF CLINICAL ENDOCRINOLOGY* 351 (1957).

⁴¹ Biben & Gordan, *Familial Hypogonadotropic Eunuchoidism*, 15 J. CLIN. ENDOCRIN. & METAB. 931 (1955).

⁴² Money, Hampson & Hampson, *Hermaphroditism: Recommendations Concerning Assignment of Sex, Change of Sex, and Psychologic Management*, 97 BULL. JOHNS HOPKINS HOSP. 284 (1955).

gonads that were either testes or ovaries, this would be a definitive way of diagnosing sex.

That this is not a completely adequate or satisfactory method, however, is shown by consideration of the third criterion, hormonal sex. In certain females, the ovaries are inert, but the adrenal gland produces androgens that masculinize the individual (female pseudohermaphroditism); and in certain males, the testes produce excessive estrogens that feminize the individual (male pseudohermaphroditism). Obviously, therefore, the mere presence of ovaries or testes cannot be the ultimate criterion; the role of the adrenal gland in producing both estrogens and androgens must also be considered.

The fourth criterion is the nature of the internal accessory organs—the uterus in the female and the prostate gland in the male. These fail to mature without medical intervention in many intersexed individuals. Since they are necessary for reproduction, their presence is useful in determining sex assignment, but not as important as some of the other criteria mentioned.

The appearance of the external genitals is the fifth criterion. Obviously, this is the basis on which sex is most commonly assigned. Where the external genitals are not completely developed, it is now possible in many cases to effect a correction by surgery or by administration of endocrine substances, so that the individual will appear to be a normal individual of the assigned sex and thus escape many accompanying emotional problems.

Assigned sex and rearing is the sixth criterion. Assigned sex is the official decision as to whether the infant is a boy or a girl; rearing is the manner in which the child is raised. Even though assigned one sex, however, the child may actually be raised more as a person of the opposite sex. Thus, a girl, when young, might be a tomboy and display masculine behavior that was approved, even though she was officially called a girl.

The seventh and last criterion is gender role, by which is meant all those things a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively. It includes, but is not restricted to sexuality in the sense of eroticism.

It has been suggested that the three criteria of chromosomal, gonadal, and hormonal sex in themselves do not afford a satisfactory basis for determining the sex to be assigned. Instead, it has been recommended that "in the case of neonatal and very young infant hermaphrodites . . . sex be assigned primarily, though not exclusively on the basis of the external genitals and how well they lend themselves to surgical reconstruction in conformity with assigned sex," and possible endocrine treatment. And for older hermaphroditic infants, children, and adults, it has been recommended both that first consideration be given to how firmly established gender role is, and that sex changes be "scrupulously avoided, except in rare and carefully appraised instances."⁴³

⁴³ *Ibid.*

Other authorities list six variables that affect sex determination: genetic (chromosomal), gonadal, endocrinological (hormonal), body habitus (appearance), genitalia, and secondary sex characteristics.⁴⁴ Since these authorities emphasize the close correspondence between the psychological and the body sex, one may infer that if an individual conforms to four of the six equally weighted criteria for one sex, he should be assigned to that sex. There are, however, many criticisms of this method of sex assignment.

And finally, it has been stated that neither the somatic sex nor the early identification of the patient with one sex is all-important. "The essential criterion is the strength of the patient's identification with one sex or the other."⁴⁵

In the opinion of the writers, no law should be enacted regarding the sex determination of true hermaphrodites at the present time. The physician, in consultation with the family, should make the decision on the basis of medical knowledge and the wishes of the family if the individual is a young child. If old enough, the individual himself or herself should be consulted. Nor would legislation be helpful regarding the sex determination of pseudohermaphrodites. It is better to leave the law books uncluttered with specific statutes and to allow the physician freely to exercise his judgment, accepting or rejecting the suggested medical criteria.

II

SEXUAL DEVIATION

A. Homosexuality

Homosexuality is commonly defined as sexual attraction toward those of the same sex. The term covers the entire range of these erotic desires, from the highly sublimated ones to definite genital gratification. The terms, latent and overt, contrast desires, largely unconscious, with actual genital practice.

The Kinsey studies⁴⁶ rate both male and female homosexuals along a seven-point scale, representing a balance between the homosexual and heterosexual aspects of an individual's history. The ratings, which depend on the individual's psychological reactions and on his or her amount of overt sexual experience, range from 0, entirely heterosexual, and 1, largely heterosexual, but with some homosexual history, to 5, largely homosexual, with some heterosexual history, and 6, entirely homosexual. The individual in the middle, at 3, equally heterosexual and homosexual, can be termed "a true ambisexual."

Far more men than women indulge in some overt homosexual behavior, and this with greater frequency. The Kinsey studies revealed that only half as many females as males had had homosexual responses, that only about a third as many had reached

⁴⁴ Cappon, Ezdin & Lydes, *Psychosexual Identification (Psychogender) in the Intersexed*, 4 CAN. PSYCHIAT. ASS'N J. 90 (1959).

⁴⁵ Stoller & Rosen, *The Intersexed Patient*, 91 CALIF. MED. 261 (1959).

⁴⁶ ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

orgasm in homosexual contacts, and that males continued their homosexual activities for many more years than did females and were far more promiscuous.

Many male and female homosexuals, both with and without a history of heterosexual experience, act and feel like other males and females, nor do they overidentify themselves with the opposite sex. For example, many male homosexuals are athletes who have strong masculine interests. In another group are males who regard themselves as taking the female sexual role, whether or not they assume other feminine attributes.⁴⁷

The causes of homosexuality are not understood. Some investigators regard the deviation as wholly or almost wholly constitutional and physiological, even though these aspects are not at present demonstrable. Others consider the deviation to be primarily psychic—one of retarded emotional development, or psychological conditioning within a family situation of parental rejection or reversal of the paternal and maternal roles.

Treatment with sex hormones has no effect on homosexuality, except for a possible psychological effect in the individual case. Administration of estrogens to males will decrease their sex drive, and administration of androgens to females will usually produce masculinization; but androgens in large doses will increase sex desire in the female, and in some cases in the male. Psychotherapy and psychoanalytic treatment have been suggested too, but very few improvements have been reported. It may, however, help some individuals with ambivalent drives to attain heterosexual adjustment, since they are not completely set against it; and it may help the homosexual to understand and accept his condition and to live with it, as Freud pointed out, although it does not alter his condition. In this sense, such treatment has had great value. Nevertheless, there is at present no clear-cut accepted medical solution to the problem.

The legal treatment of homosexuality, in this country and abroad, has been analyzed and discussed extensively in other articles in this symposium⁴⁸ and elsewhere.⁴⁹ Accordingly, the matter will not be dwelt upon at any length here. Perhaps it will suffice to observe that a more humane and rational future solution of the problem is portended by the American Law Institute's Model Penal Code,⁵⁰ with whose general philosophy in this area and many of whose provisions the writers find themselves in accord. Such a solution would demand of both homosexual and heterosexual individuals the same standards of sexual behavior: (1) no force; (2) no corruption of the young; and (3) no abuse of public decency.

⁴⁷ Bowman & Engle, *The Problem of Homosexuality*, 39 J. Soc. Hygiene 2 (1953).

⁴⁸ Ploscowe, *Sex Offenses: The American Legal Context*, *supra* pp. 217-24; Hall Williams, *Sex Offenses: The British Experience*, *infra* pp. 334-60; Stürup, *Sex Offenses: The Scandinavian Experience*, *infra* pp. 361-75.

⁴⁹ Bowman & Engle, *A Psychiatric Evaluation of Laws of Homosexuality*, 29 TEMPLE L. Q. 273 (1956); Committee on Homosexual Offences and Prostitution, *Report*, CMND. No. 247 (1957); EUSTACE CHESLER, *LIVE AND LET LIVE* (1958); PETER WILDEBLOOD, *AGAINST THE LAW* (1959).

⁵⁰ MODEL PENAL CODE art. 207 (Tent. Draft No. 4, 1955; Tent. Draft No. 9, 1959).

B. Fetishism, Transvestism, and Transsexualism

Although, as the writers have pointed out elsewhere,⁵¹ transvestism and transsexualism or complete inversion are interwoven with other sexual deviations, only fetishism will be discussed in this connection here.

1. *Fetishism*

Fetishism may be defined as a type of compulsive disorder, most usually found in males, in which an object or article largely replaces the sexual partner as a source of sexual gratification. The article or object is often associated with a beloved person, typically the mother, and it must be used—seen, touched, or smelled, in general—for the sexual act to be gratifying. Common objects are female clothing—particularly underwear, stockings, shoes, coats, furs—and parts or organs of the human body. To date, no evidence links fetishism with any physiological process. Kinsey considered that both fetishism and transvestism depend upon the psychological conditioning “involved in most erotic responses,” and that transvestism, especially, illustrates the fact that males are more liable and females less liable to be conditioned by psychological stimuli.⁵²

In some cases, fetishism is essentially normal and fairly universal. As generally practiced, it is in its legal aspects a nuisance or minor type of crime—e.g., stealing female clothes from a clothes line. In a few cases, it has been associated with more serious crime, of which the Heirens case⁵³ is an example. There, the patient, a seventeen-year-old college student, had stolen female underclothing as a fetish in childhood. Later, the excitement of burglary became his fetish, and if startled in the act of burglary, he killed at once. Convicted of twenty-five burglaries, one robbery, three murders, and one assault to commit murder, he received various sentences to run concurrently, three for life.

2. *Transvestism*

Transvestism, or cross-dressing, also found predominantly in males, may be defined as the compulsive desire of an individual to wear some or all of the clothing and to play at least a partial role of the opposite sex. It may amount largely to fetishism, as in the case of a man who dons under his suit a girdle or panties for reasons of sexual satisfaction. Some transvestites claim to have no homosexual desires and have never engaged in overt homosexual activity; they insist that they merely feel more comfortable and at ease in garments of the opposite sex than in their own clothing. Other transvestites vary from ambisexuality to complete homosexuality; and a few are what are commonly called cases of transsexualism or complete inversion.

⁵¹ Bowman & Engle, *Medicolegal Aspects of Transvestism*, 113 *AM. J. PSYCHIAT.* 583 (1957).

⁵² ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GERHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 679-81 (1953).

⁵³ Kennedy, Hoffman & Haines, *A Study of William Heirens*, 104 *AM. J. PSYCHIAT.* 113 (1947); Kennedy, Hoffman & Haines, *Psychiatric Study of William Heirens*, 38 *J. CRIM. L.* 311 (1947). See also LUCY FREEMAN, *BEFORE I KILL MORE* (1955).

Transvestism is not specifically forbidden by law, except as it may be connected with a crime of fraud or deceit, theft, or the like. But public opinion decries it, especially when practiced by men, and almost all state laws on disorderly conduct, vagrancy, or disturbance of the peace can be construed to cover it. Accordingly, some physicians issue to their transvestite patients and instruct them to carry certificates stating that for medicolegal reasons, they wear clothes of the opposite sex. While such a certificate may carry no weight with police, prosecutors, or judges, it may sometimes help; and in any event, it usually increases the patient's sense of security and well-being.

3. *Transsexualism*

The terms transsexualism or complete inversion or genuine transvestism indicate a condition in which an individual has an intense, usually obsessive, desire for a complete sexual transformation. The male transsexualist insists that he is psychologically a female and demands that his physical sex be made to correspond with his claimed psychosexual state. He may threaten and even commit suicide or self-mutilation. Such individuals are homosexual, but they deny homosexuality on the ground that they are actually persons of the opposite sex. Thus, a male patient explained that his soul and mentality were those of a woman, but God had given him a man's body.

As noted with respect to other manifestations of homosexuality, there is no clear evidence of a physiological basis for this condition. For example, in a recent study, five male transsexualists had the nuclei of "a typical male morphology" (these nuclei are now called chromatin-negative); and from this finding, it was, therefore, "inferred that these persons bear the male XY sex chromosome complex."⁵⁴ Yet, one cannot call the condition purely psychological merely because a physiological causation cannot be demonstrated. Some investigators, for example, consider a constitutional predisposition essential, followed by adverse psychological conditioning and the respective syndromes.⁵⁵ Perhaps within the next few years, following the present breakthrough in genetics, a whole series of physiological factors may be revealed.

Like all sexual deviations, at least those of which the law takes cognizance, transsexualism is far more common in men than in women. Quite well known, for example, is the case of George (Christine) Jorgensen, which attracted wide attention a few years ago.⁵⁶ There, in brief, after two years of study by Danish physicians and accompanying hormonal treatment, a twenty-four-year-old man who desired sex transformation was surgically altered and issued papers by governmental authorities enabling him to appear publicly as a woman. After publication of this case,

⁵⁴ Barr & Hobbs, *Chromosomal Sex in Transvestites*, 1 LANCET 1109 (1954); Rabach & Nedoma, *Sex Chromatin and Sexual Behavior*, 20 PSYCHOSOM. MED. 55 (1958).

⁵⁵ Benjamin, Gutheil, Deutsch & Sherwin, *Transsexualism and Transvestism—A Symposium*, 8 AM. J. PSYCHOTHER. 219 (1954).

⁵⁶ Hamburger, Stürup & Dahl-Iversen, *Transvestism, Hormonal, Psychiatric, and Surgical Treatment*, 152 A.M.A.J. 391 (1953).

the Danish physicians received requests for sex transformation from about 2,000 persons, of whom sixty were thought to be transsexualists. And these figures do not begin to approach the real number in the opinion of many investigators, who, from the biologic point of view, regard bisexuality, some types of homosexuality, and transvestism-transsexualism as stages along a continuum of sexual deviations, with so-called transsexualism as "the last consequence of a passive male or active female homosexuality."⁵⁷

Some physicians favor surgery in those patients who are inaccessible to psychotherapy. The conversion operations commonly consist of castration, penectomy, plastic transformation of the scrotum into labia-like formations, and possible construction of an artificial vagina. To those who object that physicians must not be constrained by the patient and made to satisfy his demands for treatment, it is urged that sex transformation surgery be analogized to leukotomy. Neither procedure should be dictated by juridical judgment alone, but should rather be preceded by and based upon thorough medicolegal investigation. "To help the transvestite, not to cure the transvestism, that is the question."

Clinical reports of about half a dozen female transsexualists have also appeared. These women are mostly interested in wearing male attire and taking jobs commonly filled by men. Usually such an individual lives as the husband of another woman. The intensity seen in male transsexualism is rare, however, and the treatment requested of the physician is usually less heroic.

After the notoriety of the Jorgensen case, Danish authorities refused to perform sexual transformation on males who were not Danish citizens of long standing. Conversion surgery has been performed in other European countries as well, however, and it would appear that even in Great Britain such an operation may be authorized in exceptional cases.⁵⁸ But in this country, although such surgery is nowhere expressly forbidden by law, it is generally regarded as coming within the proscription of the mayhem statutes, which for want of a suitable modern law, have "been extended to include any willful disfigurements of the body."⁵⁹ Nevertheless, surgeons will perform mastectomies alone without much reluctance, since these operations are often performed for cosmetic as well as therapeutic reasons.

There is also some uncertainty as to whether or not a change of name and civil status, which is permitted in some foreign countries,⁶⁰ may legally be effected in the United States. A male upon whom conversion surgery had been performed in Mexico filed a petition for change of name and civil status in California; but when his out-of-state birth certificate could not be legally changed, the petition was denied. In another California case, however, a similar petition was granted; but the individual's birth certificate had been made out in the name of Baby S— and bore no

⁵⁷ Anchersen, *Problems of Transvestism*, 106 ACTA PSYCHIAT. ET NEUROL. 249 (Supp. 1955).

⁵⁸ Lukianowicz, *Survey of Various Aspects of Transvestism in the Light of Our Present Knowledge*, 128 J. NERV. & MENT. DIS. 36 (1959).

⁵⁹ Sherwin, *The Legal Problem in Transvestism*, 8 AM. J. PSYCHOTHER. 243 (1954).

⁶⁰ Lukianowicz, *supra* note 58.

given name, and the county registrar was willing to change the stated sex and to fill in the new name. In still another case, only the change of name was granted, without reference to the person's sex. And in another, the individual was able to obtain a passport in his female role and characterization after his physician had written to the proper United States authorities "giving the full facts with [my] opinion and recommendation."⁶¹

Several instances of marriage between transsexualists and partners of the same sex have been reported.⁶² Late in 1959, the Charles McLeod case gained some notoriety. Reared as a boy, he had served in the army, and after a series of operations (the first of which was performed illegally) and treatment in Denmark, he had taken the name of Charlotte McLeod. He returned to the United States, and at the age of thirty-four, he married a man in Miami, Florida, since the Florida marriage law does not require previously unmarried persons above the age of twenty-one to furnish a birth certificate.⁶³

At present, many phases of the treatment of transsexualism are controversial—medically as well as legally—and no current solution is completely satisfactory. Existing laws are sufficiently flexible, however, probably to permit any satisfactory form of therapy to be practiced, if and when it is found.

⁶¹ Confidential personal communications to the writers.

⁶² Horton & Clarke, *Transvestism or Eonism*, 87 AM. J. PSYCHIAT. 1025 (1931); Redmount, *A Case of a Female Transvestite with Marital and Criminal Complications*, 14 J. CLIN. & EXPER. PSYCHOPATH. 95 (1953); Northrup, *Transsexualism, Report of a Case*, 1 A.M.A. ARCH. GEN. PSYCHIAT. 332 (1959).

⁶³ FLA. STAT. ANN. § 741.05 (Supp. 1959); San Francisco Chronicle, Nov. 14, 1959, pp. 1, 4.

SEX OFFENSES: THE MARGINAL STATUS OF THE ADOLESCENT*

ALBERT J. REISS†

INTRODUCTION

Adolescence is not a highly institutionalized position in American society.¹ It is a transitional status between childhood and adulthood, but it is less institutionalized than either of the two age-based status positions that it borders and connects. The adolescent is a marginal person who is no longer accorded the privileged status of the child, nor as yet many of the rights and responsibilities of the adult.

The relatively low degree of institutionalization of adolescence as a status position and the marginal position of the adolescent in terms of role expectations in American society are reflected in the fact that most of the norms governing adolescent behavior do not have adolescent behavior patterns as their reference point. Rather, the norms and expectations governing adolescent behavior have either child or adult behavior patterns as their reference point. The exhortations of parents and other adults admonish the adolescent either to "behave like a grown-up" or to "quit behaving like a child." They rarely encourage him to "behave like an adolescent." There are, then, no highly institutionalized expectations of how one is to behave like an adolescent, in the sense that achievement of these status expectations is a positive transitional link with the adult status.

This article is an attempt to show that the failure to accord adolescence a distinct status position that is closely integrated with the larger structure of American society and the resulting minimum institutionalization of norms for governing adolescent behavior has several very important implications for defining and sanctioning the sexual conduct of adolescents in our society:

1. The perception of adolescent sex offenders as neither children nor adults tends to (a) encourage considerable variation in definition of their sexual offenses; (b) lead to preferential treatment and differential adjudication of their cases of sexual behavior on the basis of age, sex, socioeconomic status, and jurisdictional

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¹ Throughout this article, the sociological concept of adolescent is used interchangeably with the legal concept of juvenile. The context should make clear whether the concept is used primarily in the specialized sense of one discipline or the other.

considerations; and (c) obscure the degree to which they are denied the due process of law.

2. The age-based status reference point for evaluating adolescent sexual offenses is a factor in the sanctions applied to their deviation. When adolescent sex offenders are viewed as "not adult," they are generally overprotected and absolved from moral responsibility for their behavior, thereby weakening the moral integration of the total society. When they are viewed as "not children," there often is a tendency to deal more punitively with them than with adults who commit similar sex offenses.

3. The sexual behavior of adolescents is primarily peer-organized and peer-controlled. As such, it reflects the attempt by adolescents to achieve a compromise between being encouraged to behave like adults and being denied the rights and privileges of that status. An examination of the peer-organized basis for adolescent sexual conduct provides a normative basis for evaluating their behavior in relation to the larger social structure in which they are held accountable for their behavior.

I

THE EFFECT OF ADOLESCENT STATUS ON DEALING WITH SEXUAL CONDUCT

What acts committed by adolescents will be defined as violations of sexual conduct norms? And how will his status as "not child" and "not adult" encourage variability in the definition of an adolescent's sexual conduct as a sex offense?

Despite some variation in the legal codes from state to state in our society, the statutes define the acts for which violators are classified as adult sex offenders. But the problem is not as simple for defining the juvenile as a sex offender. Most juvenile court statutes not only define the violation of all criminal statutory codes as sufficient ground for a finding of delinquency, but also hold that if the child is growing up in a situation inimical to his welfare, he or she may be adjudicated a delinquent. For all practical purposes, then, the definition of a juvenile sex offender rests with the standards followed in each juvenile jurisdiction.² The statutes, in fact, prescribe that the finding be that the child is a delinquent person, and not a specific type of offender.

Going beyond the immediate jurisdiction of the court to the legal institutions for the care and treatment of juvenile offenders, one finds that still other standards may be applied in defining what is a sex offense. Reaching out into the social environment of juveniles, one quickly finds further variation in what is a sex offense, depending upon the status environment of the juvenile's family, his adolescent peers, and the

² Appeal from the decisions rendered by a juvenile court are relatively rare, and particularly so for cases involving violations of sexual conduct norms. The relatively low rate of appeal from the decisions of a juvenile court itself reflects a social definition of the adolescent as a person whose best interest is protected by the court, so that the traditional safeguards for civil rights are unnecessary. This position needs careful examination, since many juveniles and their families are unaware of their legal rights in a juvenile hearing. The personnel in most juvenile jurisdictions make no attempt to apprise juveniles of their rights and, in fact, often express obvious resentment when the juvenile is represented by counsel.

institutional organizations within the community. There is no question but that in any of these contexts—the family, peer group and community, including the organizations administering justice—all forms of sex activity, including nocturnal emissions, may be *prima facie* evidence of the violation of sexual norms, so that negative sanctions may be invoked against the person engaging in the behavior.

The governing statutes are phrased in such general and inclusive terms that *any* sexual act or conduct can be defined as a delinquent offense. The omnibus provision for "immoral conduct or behavior" can be construed to cover all deviations from sexual conduct norms. The body of legal opinion and decision for delinquent acts similarly reflects considerable ambiguity as to what sexual conduct is to be defined as a violation and what is permitted sexual behavior for adolescents. Juveniles who are held to be guilty of a sex offense often are not charged with a specific sex conduct violation. The categories of "ungovernability," "loitering," "immoral or indecent conduct," "runaway," and similar designations frequently are the preferred charges, particularly if the court has a policy to avoid stigmatizing an individual with a sex offense. The terms "sex offense" and "sex offender" are not clearly defined, then, for adolescents in legal codes or in the adjudication of cases involving the violation of sexual conduct norms.

Most forms of behavioral deviation from norms or legal codes are linked with other forms of behavioral deviation, at least for a substantial proportion of all known deviators. For this reason, a person classified as a violator of legal or other conduct norms governing sexual behavior also may usually be classified as violator of other legal conduct norms. An adolescent boy or girl who is arrested for stealing almost always has also violated sexual conduct norms, and the reverse is usually the case as well. In behavioral terms, then, it is not particularly meaningful to define a person as a sex offender. This, of course, is true of most other delinquency classificatory terms as well. One technically violates the sexual conduct norm through behavior and thereby commits a *delinquent* offense. The term sex offender should perhaps signify no more nor less than this. Certainly, it should not imply that this is the only major kind of delinquent activity the person has committed. To classify a person as a sex offender may only serve to develop self and public definitions of the person as a sex offender.

The term sex offender, of course, is very ambiguous since it does not specify the specific kind of behavior that is used as the basis for charging a violation. But even if one employs specific behavioral definitions—as, for example, by designating the person as an exhibitionist or an unwed mother—the charge usually would not exhaust the sexual conduct violations for which the person could be charged. As Kinsey and others have shown, total sexual outlet is derived from a variety of types of sexual behavior,³ almost any one of which could in the case of many adolescents be used to

³ ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE passim* (1948) [hereinafter cited as KINSEY MALE REPORT]; ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GERHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE passim* (1953) [hereinafter cited as KINSEY FEMALE REPORT].

charge conduct violation. Although there is difficulty in classifying a person as a type of offender when an act of sexual behavior violates a conduct norm, the simple cumulation of such acts as a basis for classifying a person as a specific type of offender (e.g., persistence) involves one in even greater difficulty. Not only is it difficult to secure accurate and reliable statistics on violation of sexual conduct norms for adolescents charged with a sex offense, but, as Kinsey observes, the frequency distribution is continuous for any kind of sexual behavior; any cutting point chosen on that curve, therefore, is arbitrary.⁴

The status of adolescent is an apparent factor in the application of adult sex norms to their conduct. The prescribed form of sexual behavior in American society is that of heterosexual coition in private surroundings between partners in a monogamous marriage. The legal norms, however, specifically prohibit adolescents to marry without the consent of parents. Unless this condition is met, therefore, heterosexual coition is proscribed for an adolescent. This example is instructive in that the norms do not specifically prohibit young persons from engaging in heterosexual coition; the limitation rather arises for adolescents because of difficulty in satisfying the conditions for marriage. Adolescents lack both the privilege and opportunities for self-determination of their marital status and thereby for their heterosexual behavior that culminates in sexual intercourse. It is not surprising, therefore, that for adolescents, petting to orgasm becomes a functional equivalent to coition.

Adolescents themselves set standards for what is a violation of their sexual codes. The standards in these adolescent codes vary considerably according to the social status position of the adolescent and his family in the larger society. A comparison of the prescribed heterosexual coition patterns of middle- and lower-status boys and girls may illustrate this variability. Among the lower-status white adolescent boys in our society, premarital heterosexual intercourse is prescribed to secure status within the group, while it is not necessary to secure status within most middle-peer status groups, even though it does confer some status.

Heterosexual behavior with prostitutes is not very common among adolescents up to the age of fifteen, although it is more common after that age. For adolescent boys, however, intercourse with female prostitutes comprises only a relatively small proportion of their total sexual outlet. Premarital sexual intercourse apart from organized prostitution is far more common among boys than is intercourse with prostitutes.

Among young lower-status adolescent boys, perhaps the most common mode of heterosexual intercourse is the "gang-shag" or "gang-bang." A gang of boys usually knows one or more girls who are easy "pick-ups" for the group who will consent to serial intercourse with the members of the gang. To understand this behavior, several peer normative factors need to be taken into account. First of all, the girl in the "gang-bang" almost always is one who gives her consent. She is not being sexually exploited in any sense of forcible rape. In fact, when she consents to being

⁴ KINSEY MALE REPORT 199.

picked up, she understands that she is to be a partner in heterosexual coition. Lower-status boys clearly distinguish between "putting it to a girl" (she consents) and "making a girl" (she does not consent). Few lower-status boys, particularly delinquent boys, will "make a girl," although almost all frequently engage in heterosexual intercourse and most have at least participated in a gang-bang. Most lower-status adolescent boys express the view: "Why should I *make* a girl when I can get all I want without it." The opportunities for heterosexual coition with consent are ever present to lower-status boys, so that they negatively sanction forcible rape. This is not to say that some adolescent girls are not forcibly raped by an adolescent boy or even a gang, but the proportion who are is, without doubt, very small.

The girl who consents to sexual intercourse with the gang loses her reputation as a "nice girl," and they no longer regard her as a possible partner in a marriage relationship.⁵ Her status becomes that of a prostitute. Similarly, a girl who consents to sexual intercourse with a number of boys, even if the acts are separate and private, risks her reputation as a partner in marriage. The status of an "easy mark" in sexual intercourse sharply reduces her life chances for marriage, at least among the lower-status boys who are acquainted with her. As a consequence, sexual behavior becomes her only competitive claim to masculine attention. This very loss of status as "marriageable," with the substitute status as "easy-to-get," gradually forces the girl either to withdraw altogether from the competitive struggle for the attentions of boys or to bargain increasingly the only thing she has—*i.e.*, sexual favors.⁶

The adolescent girl faced with the status dilemma described above is likely to adopt one of two solutions to the problem. One of these is the "steady date," which includes the "understanding" that he has sexual access to her and she is guaranteed a steady date—she does not have to compete with other girls for a date. Under these circumstances, the girl can defend her behavior in terms of romantic love ideals. Many middle- and upper-status girls undertake heterosexual coitus under these circumstances, since it protects their status within the group. They are "in love," "going steady," and "intend to be married"; *ergo*, if coition is a private act between two who are as married, it can be permitted. The other major alternative is some form of prostitution, either in organized prostitution or through the acquisition of a status or reputation as a "pick-up" or "easy-to-get" girl. The major risk a girl encounters in either solution is that of pregnancy, while in the case of prostitution, she also runs a fairly high risk of venereal infection.

It is not so much the sexual act of coition that brings the girl to the attention of legal authorities as it is either of these consequences of the act—premarital pregnancy or venereal infection. The couple is seldom caught in the act of coition. Since girls are more likely than boys to be defined as the carriers of venereal infection, a girl who

⁵ See, *e.g.*, Whyte, *A Slum Sex Code*, 49 AM. J. SOCIOLOGY 24 (1943). Investigation since Whyte's original statement of this sex code discloses that this might more appropriately be called the sex code of low-status persons in American society, whether or not they dwell in slums.

⁶ See JAMES F. COLEMAN, *SOCIAL STRUCTURES AND SOCIAL CLIMATES IN HIGH SCHOOLS* chs. 3 and 4 (1959).

is picked up by police or juvenile authorities is almost always given a physical examination to determine whether she has had sexual intercourse, now has a venereal infection, or is pregnant. This is particularly true for runaway girls. Boys seldom are given as complete a physical examination for venereal infection as are girls. Even less often are they questioned as to their sex experiences. There is a great variation among jurisdictions in this respect, however. Personnel in some are more likely than in others to learn about the sexual deviation of girls. The life chances of a girl before police and juvenile authorities, therefore, are more favorable to definition as a sex delinquent than are the life chances of the boy.

A number of other factors are important in the greater relative frequency with which girls, as compared with boys, are defined as sex offenders. Many policemen come from lower-status social origins. In their youth, many of them, therefore, shared the sex patterns of the lower-status boys and accepted the norm that deviation in heterosexual intercourse is permissible. So long as the boys do not forcibly rape a girl, or so long as the girl's parents or others do not file a complaint, the police are generally accepting of this form of sexual deviation. They may make a concerted effort to limit the opportunities for deviation, since that is expected of them in their work role, but they seldom arrest on discovery. Discovery in the act of intercourse is difficult, so that evidence is almost always obtained by confession or circumstances.

Adolescent boys come to the attention of the court as heterosexual sex offenders usually only when the morality of the girl's family is offended. The most common form of complaint is for the family to define coition as "rape" of their daughter. Research evidence shows that in most cases, the boy is not a rapist in any technical sense that force or coercion was used. The act occurred through common consent. The complaint arises because the girl, under family pressure, charges that she did not consent. Although many complaints arise in this way, it does not follow, of course, that some delinquent boys gangs do not forcibly rape a young girl nor that boys individually do not engage in such acts; it is rather to emphasize that available evidence strongly indicates that most heterosexual coition between adolescents occurs through mutual consent. The girl has a reputation. She is sought out or picked up. She knows what is expected of her, consents, and services one or more boys. No money is exchanged.

Middle-status boys do not prescribe premarital intercourse, and certainly not at as early an age as do lower-status boys. Experience in heterosexual coition confers status, however. The middle-status white adolescent boy assumes no obligation for premarital pregnancy, and marriage under these circumstances is to be avoided. The preservation of a middle-status boy's reputation is more important than the preservation of the reputation of the girl, particularly if she is of lower social status. Community organizations will strive to preserve his reputation, even at the expense of the reputation of the girl.

It has been suggested that a major difference between lower- and middle-status adolescents in respect to premarital intercourse is that lower-status girls commonly

enter into the relationship by perceiving it as fun morality—"if it's fun, it's good"—while middle-status girls see it as one involving love morality—"it's good because we're in love."⁷

Status within a peer group is a very important factor determining whether an adolescent girl will engage in coition with boys. Courtship patterns in American society require that girls use a variety of means to attract males as dates or potential marriage partners when in competition with other girls for these boys. One of the competitive advantages a girl has available to her is her sexual attractiveness to males. Yet, the male norms prescribing the ideal marriage mate require that the girl one marries cannot have a reputation among other males as being sexually immoral. A girl's competitive advantage, therefore, is easily lost if she gains the reputation that she will enter into a sexual liaison with a boy if she is dated. Recent research shows that the adolescent girl who fails to acquire status within a conforming adolescent peer group of girls is at a competitive disadvantage in securing dates with boys, since dating is largely controlled by peer groups of boys and of girls who enter into "diplomatic relations" with one another. The failure to acquire status within a peer group of girls forces a girl to date by herself rather than "double date," to use more overt means of sexual attractiveness to get a date, or to withdraw from dating competition altogether. The use of any means to get dates other than those controlled by the peer group of girls results in her further exclusion from the peer society and leads to a definition of her as "sexually loose." Girls often communicate such definitions to groups of boys before the boys have formed a similar evaluation of the girl. An adolescent girl's status as being sexually immoral, therefore, often arises among girls rather than among boys.⁸ Having acquired such an unfavorable definition then further deprives a girl of using conventional dating attributes as a means for getting the attention of boys in competition with other girls. Gradually, her only means for getting a date, therefore, is her reputation of ease of sexual access. She progressively is forced to resort to the use of this means if she hopes to attract boys as dates, and her behavior must conform to the boy's expectations once she gets the date.

The single most important reason, perhaps, why most adolescents who engage in premarital coition are not defined as delinquents is the difficulty in detecting couples in the act of violation and obtaining evidence of coition. For the most part, adolescent violators have a strong social status investment in not being discovered. This renders detection even more difficult. Violators, therefore, seldom come to the attention of the police or juvenile officials unless a girl involved in heterosexual coition, or her family, enters a formal complaint. Interrogation then is the principal means for determining whether the accused boy or boys are guilty of the offense. In some jurisdictions, even a lie-detector then is used on the boy, without any regard

⁷ Vincent, *Ego Involvement in Sexual Relations: Implications for Research on Illegitimacy*, 65 *AM. J. SOCIOLOGY* 287 (1959).

⁸ See COLEMAN, *op. cit.* *supra* note 6, chs. 3 and 4.

for his consent, in an effort to determine whether or not the behavior was as charged. Middle-status families generally will not risk the reputation of their daughter by bringing heterosexual violations to the attention of the police and courts, while lower-status families are less likely to see such a risk for their daughter. The lower-status family, in fact, sometimes sees formal complaint as necessary to protect the status reputation of their daughter. The effect of these status differences in the discovery and reporting of sexual violations is that the lower-status boy or girl is more likely to come to the attention of the police and courts as a sex violator than is the middle-status adolescent.

One is impressed with the fact that the judge and personnel attached to juvenile courts produce considerable variation in defining what is to be regarded as a sexual offense and who is to be classified as a sex offender. Some years ago, the writer observed delinquency petition hearings before a metropolitan juvenile court and examined the records for some 1500 cases of the court adjudicated by a single judge. During this time, the judge refused to treat any form of sexual behavior on the part of boys, even the most bizarre forms, as warranting more than probationary status. The judge, however, regarded girls as the "cause" of sexual deviation of boys in all cases of coition involving an adolescent couple and refused to hear the complaints of the girl and her family; the girl was regarded as a prostitute. Observation within a southern county jurisdiction some years later, where a religious fundamentalist judge presided, showed almost the opposite pattern in decisions. The girl was invariably seen as victimized by the boy.

Much of the variability in juvenile court jurisdictional standards as to what is a sex offense and who is a sex offender is attributed to differences among court personnel, including the presiding judge. The question can be raised, however, as to why such variability is possible. What is it within the juvenile court structure that permits such variability in standards and practices? The answer can largely be found within the structure of the juvenile court itself and the definition of delinquency in the statutes.

Juvenile courts were founded largely on two principles: The individual rights of the delinquent child were to be safeguarded by the court acting in the role of *parens patriae*, and the minor was to be protected from the association with adult criminals and from the application of rules of law for adult criminals that were deemed inapplicable to minors in many instances. The putative advantage of the court was that it would prevent juveniles from moving into a life of adult crime.

This is not the place to examine in detail whether the juvenile court has operated within these principles. It seems clear, however, that most juvenile court jurisdictions do not operate to safeguard the rights of minors in terms of the due process of law, that facts in juvenile court proceedings are subject to considerable interpretation and opinion, and that the probability of appeal from decisions of juvenile court decisions is, for many reasons, quite low. The result is that individual prejudice and opinion on the part of arresting officials and of court personnel are particularly likely to play

an important role in adjudication of juvenile court cases. The word of police officers and of court investigators and the opinion of judges largely go unchallenged, particularly if the juvenile is from a low-status family. The juvenile may even be forced to take a lie-detector test without his consent, and almost any kind of evidence is admissible in reaching a decision that he is to be adjudicated as a delinquent.

These violations of civil rights and the disregard for due process arise from the ambiguous status position of the adolescent in American society. The adolescent is held accountable for violations of adult sexual norms, but is not entitled to the rights and privileges of adults before the courts. Put in another way, juveniles are assigned a special legal status where they are "not adult" and "not child," but where punishment or justice is administered for not conforming to adult norms. In general, it might be said that the principles and procedures of juvenile courts need to be carefully examined from the standpoint of assigning definite rights and privileges to the juvenile. These rights should be consistent with an adolescent status position that is integrated into the total structure of society. The assignment of such rights and privileges and the recognition of their importance in adjudicating an individual delinquent seems imperative in a society that is increasingly becoming conscious of problems of civil rights.

The ambiguities of adolescent status and the variation in procedures for adjudging an individual delinquent granted to juvenile court jurisdictions make it possible for prejudice and opinion to enter into decisions about juveniles more than it does in the case of adults. Since interpretations of sexual deviation are particularly fraught with prejudice and opinion in American society, the court is particularly prone to adjudicate cases of sex violation where these factors are operative.

Mention has already been made of the fact that juvenile court statutes permit a wide range of behavior to be defined as delinquent. This is, of course, owing in part to the fact that in a technical sense, juvenile court judges do not enter a finding of guilt for a specific crime. The minor is simply adjudged a delinquent.⁹ This legal technicality, however, obscures the fact that the decision to enter a finding of delinquency is based on a prior finding that behavioral acts violate either criminal codes or provisions of the juvenile court act. Proof of delinquency is a necessary part of adjudication.¹⁰ The difficulty in adjudicating cases involving sex offenses lies in the fact that there is at least a double standard for adolescent and adult.

Only two states, Indiana and Wyoming,¹¹ have ever held it a crime to encourage a person to masturbate, and none makes it a criminal offense for an individual to masturbate. Juvenile court statutes, however, permit masturbation to be defined as immoral conduct, particularly if it occurs in a group setting, as it sometimes does

⁹ Most states specifically deny the juvenile court any power of conviction. See, e.g., *Mickens v. Commonwealth*, 178 Va. 273, 278-79, 16 S.E.2d 641, 643 (1941), where the trial and punishment of juveniles for a specific offense is specifically prohibited.

¹⁰ In the *Matter of Arthur Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932).

¹¹ IND. ANN. STAT. § 10-4221 (1956); WYO. COMP. STAT. ANN. § 9-520 (1945).

among adolescent boys. But it is only rarely that the court will adjudicate such cases.

Many Americans, particularly at the lower-social-status levels, still condemn masturbation. Nowhere is this condemnation more apparent than in the codes governing sex behavior in institutions for adolescents. Masturbation is usually severely condemned within these institutions, and punishment is administered for its practice. At one such institution, a state training school for boys, the writer recently discovered that boys were physically punished if caught in the act of masturbation. Repeated violation resulted in confinement to the disciplinary dormitory of the institution. Such administrative policies within institutions to which delinquents are committed by the court or in which delinquents are held in detention by the court appears only to heighten the ingenuity of adolescents to seek more clandestine modes of sexual outlet. Among other consequences, the policy may only serve to exacerbate the problem of controlling homosexual practices in these single-sex institutions.

Homosexual behavior takes many forms and over a period of time involves such a large proportion of persons that it is difficult to treat these behaviors as having very much in common from a sociological or a psychological viewpoint. The laws regarding homosexual behavior appear as statutes against sodomy, crimes against nature, unnatural acts, buggery, indecent behavior, and lewd or lascivious conduct. To avoid the stereotyping of a boy as a "homosexual," some juvenile court jurisdictions, in fact, charge either "indecent behavior," "lewd and lascivious conduct," or "loitering." The penalties prescribed in criminal statutes for homosexual behavior are generally so severe that acts of sexual deviation are not punished as severely in any nation as in the United States. There is a tendency for juvenile court jurisdictions to ignore homosexual behavior among adolescent boys of the same age, so long as common consent is involved. At the same time, there is a countertendency to treat boys involved in homosexual acts as mentally ill. The problem of homosexual behavior among adolescent girls seems almost altogether ignored. There is one instance, however, in which the court may define the problem as a serious one, and that is where the boy or girl is involved in a homosexual relationship with an adult. This type of relationship is particularly common among lower-status boys and adult males. Lower-status, career-oriented delinquent boys often are involved in some form of sexual relationship with an adult male.

The sexual mores for single adolescents in American society are ambiguous. If the conditions for the prescribed form of sexual behavior are not met, then abstinence is prescribed. Basically, this norm assigns all other forms of sex behavior to a lower normative order. Not all other forms are tabooed, however, since who does what to whom, how, and under what circumstances will determine public reaction and sanctions to the sexual behavior. There are several basic elements that will determine

the reaction to the kinds of sexual behavior between persons in different combinations of social positions under varying social circumstances.

The first of these elements is the *social visibility of the offense*. The more public the circumstances in which any sexual behavior takes place, the stronger the taboo and the sanctions against violators. By way of illustration, masturbation is generally permitted in private, but it is strongly tabooed in public as a form of exhibitionism.

A second element is the *social visibility of the offender*. The offender may be socially visible apart from the offense. Thus, an unmarried woman whose pregnancy is noticed is known to have transgressed the mores.¹² The transvestite, by reversing sex roles, is perceived as guilty of a sexual offense, although sexual acts are seldom actually observed for them. In adopting the clothing of the opposite sex, the transvestite invites strong public reaction, since the reversal of social roles becomes socially visible.

An extremely important element determining public reaction to acts of sexual deviation is the *degree to which the status and role of the participants in the sexual act depart from the status and role expectations for these persons apart from the sexual act itself*. In American culture, the male is expected to assume active roles and the female, passive roles. The degree to which the male departs from the masculine, active sex role or the female departs from the feminine, passive sex role, therefore, is a factor in public reactions to the deviating sexual act. The "pansy" and the "castrating female" both seem more likely to be sanctioned for homosexual deviation than are the participants who fulfill conventional active-passive sex-role expectations. The socialization of children requires that parent-child authority relations be maintained. Incest is universally tabooed primarily because the status and role expectations for family members cannot be fulfilled when heterosexual behavior is permitted between members of the same nuclear family.¹³ Upper- and particularly middle-status persons in American society are regarded as the guardians of morality; women are so regarded more than men. Lower-status persons are regarded as persons to be condemned or saved from their immoral behavior. These norms apply as well to sexual behavior. The lower the social status of both participants, the more acceptable the behavior. Proscribed sexual relations between parties who have low social status, such as Negroes, criminals, or "low class," are more readily accepted than proscribed sexual acts between whites, conformers, or middle-class persons. The middle-class white woman, who is regarded as the custodian of American morals, is most strongly sanctioned for her behavior if it is defined as voluntary, but her

¹² In order that the sexual act leading to pregnancy be socially visible, the boy and girl would have to be observed in intercourse. Only the girl's sexual deviation is socially visible, however, in the pregnancy that ensues from the act. There is a special problem here anyway, since the father's status can never be proved in any absolute sense, while that of the mother is determinable.

¹³ For a detailed discussion of just how incest interferes with status and role expectations in family socialization processes, see TALCOTT PARSONS & ROBERT F. BALES, *FAMILY SOCIALIZATION AND INTERACTION PROCESS* 101-03, and 305-06 (1950).

involvement is most likely to be seen as that in which she is the victim of sexual aggression; it is intolerable to think of her as sexually aggressive.

The norms of American society permit women to use sex, particularly sex enticements, as a means to other ends—most specifically in her attempts to find a marriage partner. The male, however, is not permitted to use sex as a means; rather, he must seek it as an end in itself. The social status of adolescent boys in our society, especially within lower-status peer groups, rests in part on their sexual conquests. Among adolescent boys, in fact, it appears that gratification is less important in the sexual relationship with a woman than is the act of conquest itself, since conquest confers status within the peer group. *Acts of sexual deviation that depart from the expectation that females must seek sexual activity as a means and males as an end in itself* are more likely to arouse public indignation. It is more acceptable, therefore, for a low-status girl to advance her social position by coition with a higher-status male than it is for a low-status boy to initiate a sexual act toward a higher-status girl. For this reason, too, it is more acceptable for males socially to degrade themselves in the sexual act than it is for women to do so. Men are viewed as seeking sex as an end in itself, but women are allowed to seek it only as a means to other ends. For this reason, too, boys are allowed greater versatility in their choice of sexual partners (including animals) than are girls.

The degree to which the behavioral act departs from the model of heterosexual coition also is a factor in public reaction to deviating sexual behavior. Although mouth-genital fellation is a felony in most states, it is much less likely to be treated as a felony in heterosexual than in homosexual contract. Likewise, since infrahuman contacts depart most from the expectation, they have the lowest relative incidence of all major types of sexual activity and are most condemned.

Within American society, there are important subgroup differences in codes governing sexual conduct. The lower-status groups in American society, for example, generally sanction premarital sexual intercourse with the expectation that culmination in pregnancy prescribes marriage if the girl is "nice"—i.e., not sexually promiscuous. Similarly, this lower-status subgroup prefers (but does not prescribe) virginity in the female chosen as the marriage partner, but prescribes that the single male have regular outlets for heterosexual intercourse.¹⁴ There are subcultures, too, such as that of the beatniks, that prescribe any form of sexual act so long as it maximizes sexual gratification,¹⁵ or some delinquent ones that legitimize the role of prostitute with adult male fellators.¹⁶ Still other subgroups positively sanction celibacy and/or sexual continence, as, for example, men and women in religious orders.

There also are differences in structural opportunities for sexual deviation from

¹⁴ See Whyte, *supra* note 5, at 29.

¹⁵ Mailer, *The White Negro*, 4 *DISSENT* 276 (1957).

¹⁶ ALBERT J. REISS, JR. & A. LEWIS RHODES, *A SOCIO-PSYCHOLOGICAL STUDY OF ADOLESCENT CONFORMITY AND DEVIATION* ch. 9 (1959).

community to community and in the life situations of adolescents.¹⁷ A boy or girl residing in a lower-status, urban slum area has more opportunities to come into contact with certain forms of organized prostitution. The single-sex social structures and arrangements as found in school and college dormitories and training schools for boys and girls, with their increased sex segregation limiting heterosexual contact, lead to the availability of other forms of sex behavior. The typical state training school, for example, increases the exploitative homosexual contact between boys or girls of the same age and creates the role of the "punk" or "queer" among others. The differences in availability of contact with subgroups that hold norms positively sanctioning sexual behavior at variance with the legal norms of the larger society and the actual availability of opportunities to engage in deviating forms of sexual conduct are important factors, of course, in accounting for the patterned differences in sex behavior among adolescent subgroups in our society. In general, the lower-status adolescent boy living in a large metropolitan subcommunity that is homogeneously lower-class is most likely to have experienced and positively to sanction all forms of sexual conduct.¹⁸

II

THE RELATION OF ADOLESCENT STATUS TO SOCIAL SANCTIONS FOR SEXUAL DEVIATION

There is informal recognition among adults responsible for enforcing the sexual codes in our society that much sex deviation among single adolescents must be tolerated—that it is "normal" behavior and, therefore, it is a permissible, although not a preferred, form of behavior. This is particularly true of premarital heterosexual intercourse among adolescents. So long as an unwanted pregnancy does not occur and the partners are reasonably close to one another in age, the behavior seldom invites strong legal sanctions. Our culture, in fact, goes so far as to allow one to teach adolescents contraceptive behavior and the importance of recognizing and receiving treatment for venereal disease at the same time that it exhorts adolescents to shun premarital intercourse and legally prohibits it. The pragmatic in the culture requires at least that adolescents "be prepared" when they deviate (as we expect they will).

While heterosexual intercourse is permitted if it is a private act between an adolescent boy and girl, society clearly does not tolerate the behavior if it becomes public and thereby flouts the mores. Nowhere is this more apparent than in public reaction to the illegitimate child of the single adolescent girl. The boy is not treated as problematic in this case, but rather it is the girl who is the offender. It has been suggested that the reason for this is that pregnancy by its social visibility challenges the mores. The challenge must, perforce, be met with negative sanctions.¹⁹

While data on the incidence of premarital pregnancy are difficult to obtain, it seems clear that the lower-status girl, particularly of low-status ethnic minorities,

¹⁷ See McKay, *The Neighborhood and Child Conduct*, 26 ANNALS 32 (1949).

¹⁸ REISS & RHODES, *op. cit. supra* note 16, ch. 9.

¹⁹ See CLARK E. VINCENT, *UNWED MOTHERS* (forthcoming).

who also is of borderline intelligence and social skill is most likely to be made a legal offender for premarital pregnancy. From a social-problems perspective, of course, this type of girl poses the greatest risk for recidivism, so that it is not too surprising that she is selected for definition as a sex offender. But it must be remembered that she also is least able to defend herself before the courts or to seek extralegal assistance, given her life chances. Thus, a girl is more likely to be negatively sanctioned for premarital pregnancy if she is in the weakest power position to affect the legal sanctioning system and has least opportunity (and perhaps wish) to hide the social visibility of her deviation.

The failure to accord adolescents a distinct status position in American society, so that there are clear-cut expectations regarding their behavior, has implications for the degree to which punitive sanctions are employed in dealing with sexual deviation and the degree to which the adolescent is seen as morally responsible for the deviating act.

When the adolescent is defined as "not a child," the adolescent often is treated more punitively than an adult for the same act of sexual deviation. This is especially the case when the adolescent is viewed as a morally responsible agent who deliberately or voluntarily enters into an act of sexual deviation. An unmarried adolescent girl who is to bear a child often is sent to a delinquency institution for her act of sexual deviation, while an older woman who similarly bears an illegitimate child is not usually so sanctioned by the courts. (In both cases, of course, the babies are socially valued for their adoption status.) To choose another example, in New York State, adults are permitted to practice homosexual acts as private behavior, but juveniles are punished for private homosexual acts if it is known they have engaged in this form of sexual deviation.²⁰

When the adolescent is defined as "not adult," society and its legal arm tend partially to absolve the adolescent from moral responsibility for the deviation and to protect the child from the full force of the sanctions, or altogether fail to sanction the behavior. This is usually the case when the adolescent is socially defined as the "victim" or "exploited party" in the sexual deviation. An adult who is viewed as exploiting an adolescent for sexual ends will be more severely punished for this than for the same act with an adult. The relationship between an adult male and an adolescent boy requires special discussion in this connection, since the social and legal definition of the relationship is one in which the adult male is defined as a homosexual who is exploiting the juvenile.

Recently, research has shown that the social definition of the sexual relationship between an adult male and an adolescent boy is in many cases erroneous. The homosexual act in a large proportion of cases occurs within a prostitute-client set of expectations, where the adolescent boy is the prostitute and the adult male is the client. From the standpoint of the lower-status delinquent boy who usually gets involved in this sexual relationship, the act is an instrumental one in which the boy

²⁰ N.Y. PENAL LAW § 690.

seeks adult males, particularly fellators, to minimize the risk in making money. A brief description of the way this behavior is organized in a number of metropolitan areas may serve as an illustration of what is involved in the relationship.²¹

Adolescent boys in delinquent gangs quite commonly seek out older males—"queers"—to perform mouth-genital fellatio in exchange for money. These boys, however, have no conception of themselves as homosexual, although they view the fellator as a "gay" or "queer boy." The relationship, however, is quite clearly defined and prescribed as a part of the culture of career-oriented delinquents. There are a number of elements in this definition. Peer-hustling of "queers" is defined as an acceptable substitute for "legitimate" delinquent earnings (theft, for example) when one cannot afford to risk being caught. The "peer-queer" sexual transaction of mouth-genital fellation provides "easy money" for the delinquent boy at very low risk of being caught.

The delinquent boy often is inducted into this form of hustling by his older peers. He learns how contacts are to be made and where they are easily effected. Above all, he learns the norms and sanctions attached to the relationship. There are several such norms. He learns first of all that the sexual transaction with a "queer" must occur solely as a means of making money, that the relationship should be restricted to mouth-genital fellatio, that it must be affectively neutral, and that violence must not be used against the "queer" if he conforms to these expectations. For many career-oriented delinquent boys, then, hustling of "queers" is permitted. For other delinquent gangs, the practice becomes one of "queer-baiting," to roll the "queer" for his money, since he fears legal recourse to charge he has been robbed. In either case, the adolescent boy exploits adult males in the homosexual transaction, if exploitation is a meaningful term in this context.

The point to be made about legal sanctions in this context is that in many instances, the sexual transactions between adult males and adolescent boys arise precisely because both parties are outside the law. The laws of our society and the mores of the public define both delinquents and adults who engage in homosexual practices as deviators and restrict their opportunities to pursue their respective goals. Under these circumstances, it is not surprising to learn that the adult male who engages in homosexual acts and the delinquent pursue a mutually instrumental relationship.

In a fairly large number of cases involving an adult male and an adolescent boy in a sexual transaction, it is questionable whether the adult male seduces the adolescent boy. There are, of course, cases in which such seduction occurs. These cases of seduction, however, do not appear to involve large numbers of adolescent boys—certainly not to the point where the boys in the long run become involved in homosexual practices. Most of the delinquent boys who become involved in the

²¹ Investigation discloses it is quite common among career-oriented delinquents in such large metropolitan areas as Chicago, Los Angeles, New York, and Washington, D.C., and smaller ones such as Nashville, Tenn. It is observed in smaller cities that attract large numbers of adult male homosexuals, such as the resort city of Hot Springs, Ark.

"peer-queer" relationship described above do not continue the practices after adolescence. A small proportion of them undertake hustling careers,²² but most assume the typical lower-status adult male role of husband and father. The relationship never was defined by the boy as one in which he was in the social roles of either homosexual or prostitute.

The socioeconomic status of the adolescent is of some importance in the sanctions attached to sex violations. The higher the socioeconomic status of the adolescent's family in the community, the more likely the family is to afford legal counsel and, therefore, to require that the evidence clearly support the charges. In cases involving a sexual offense, it is particularly difficult to provide the necessary evidence to substantiate the charge. The court, therefore, is less likely to enter a finding of delinquency in cases where legal counsel are involved. It is unlikely that the boy or girl from a high-socioeconomic-status family who gets involved in a sex violation will be sent to a state-operated juvenile institution, since other and private means will be found to treat him or her—means of which the court will approve. For example, the lower-status pregnant girl who is single often is committed to a girl's institution as a sex delinquent. If a middle-status girl who is premaritally pregnant comes to the attention of the court at all (and she seldom does), the court will usually agree to her voluntary entry into a maternity home. Similarly, the middle-status family will seek the services of a psychiatrist or a clinician to treat its adolescent child involved in deviating sexual offenses such as exhibitionism or handling small children, and the court will adjudicate the case unofficially. The lower-status child with a similar offense often is committed to a public institution, where clinical treatment is given.

III

SOME PROBLEMS IN THE APPLICATION OF LEGAL CODES TO ACTS OF SEXUAL DEVIATION INVOLVING ADOLESCENTS

Perhaps the most difficult problem in legally dealing with sex violators is that the incidence of sex offenses among adolescents far exceeds their adjudication. Although it is impossible to obtain precise estimates of the incidence or prevalence of deviation from the sex mores or legal codes defining sex violations, the rate for adolescents undoubtedly is very high. Kinsey estimates:²³

On a specific calculation of our data, it may be stated that at least 85 per cent of the younger male population could be convicted as sex offenders if law enforcement officials were as efficient as most people expect them to be.

A comparable estimate is not available for the younger females, although it is guessed below this figure. The simple fact is that it is quite difficult to detect persons in the act of committing a sex offense, given the essentially private circumstances under which they may occur and the circumstance that no other law is being

²² See Ross, *The Hustler in Chicago*, 1 J. STUDENT RESEARCH 13 (1959).

²³ KINSEY MALE REPORT 224.

violated. In addition, our social organization provides considerable support for evading detection for a sex offense, so that it is difficult to obtain sufficient evidence to enter a finding of sex delinquency. Most persons, including police officers, hesitate to risk the publicity associated with sex cases, including juvenile sex cases. While it would seem that the juvenile court procedures offer sufficient protection against publicity to persons offering testimony in such cases, the general public is unaware of this fact.

The result of this discrepancy between incidence and detection is that only the most socially visible offenses and offenders come to the attention of the court. Chance, therefore, may be the major factor in detection.

The interpretation of legal sex codes in our society is based on the assumption that juveniles are incapable of consenting to some kinds of sexual behavior or to a sex act that does not involve other adolescents. The adolescent in these cases is seen as exploited or seduced by others, usually older persons. Preceding discussion has emphasized that such an assumption is untenable, given the sex behavior of most adolescents in American society. Disregarding masturbation that may occur within a group setting, available evidence supports the view that (1) the majority of acts of sex deviation involving an adolescent occur only with other adolescents or at least persons relatively close to them in age; and (2) probably only a minority of sex contacts that adolescents have with older persons may be viewed as an act of exploitation or seduction on the part of the older person. A brief summary of some of the evidence in support of this proposition may serve to introduce the discussion that follows.

A majority of all boys and girls in the preadolescent years experience either homosexual and/or heterosexual sex play contrary to the mores.²⁴ By the way of contrast, less than half as many boys and girls ever report they were approached by adults with sexual intent, and the large majority who report being approached report it was either verbal or exhibitionistic. When it is remembered that most such approaches to the preadolescent appear to come from adolescents rather than from older adult persons, it seems clear that the preadolescent sexual experience is largely confined to persons at their age level or that of an adolescent.

Heterosexual intercourse is primarily limited to partners within several years of one's own age. Intercourse with persons in organized prostitution does not involve a large proportion of boys or girls with a high frequency of contact. Among lower-status boys and girls, the group culture sanctions practices of heterosexual coition in a group setting. The older the adolescent boy or girl, the more likely, however, that the partner is an older teen-ager or person in the twenty-year age group. There is considerable evidence, however, that the major basis of induction into heterosexual intercourse is the peer society itself, and not through seduction by adults.

Homosexual practices often begin in the preadolescent period with other pre-

²⁴ *Id.* at 168-74; KINSEY FEMALE REPORT 108-10.

adolescents. For lower-status boys in particular, the contact with adult males in sexual behavior is an instrumental one of "queer-baiting," described where the boy seeks out the "queer" to roll or assault him for his money or to steal his car, or enters into a prostitute-client sexual relationship with him because the sexual practice provides income with a minimum of risk. Induction into these homosexual practices, as noted, is defined and supported by the delinquent peer society, and its members often initiate younger members into the practices.

Thus, while some adolescents are seduced by older persons into acts of sexual deviation, the majority are not. Adolescents either mutually consent to the practices or they establish relationships with older persons in some form of organized prostitution in which the delinquent is the entrepreneur and purveyor of service.

It should be clear that these adolescent group determinants of deviant sex behavior may be more true for boys than for girls, and for low- than for middle- or high-status adolescents. It also seems to be the case that the low-I.Q. person is more likely to be victimized by older persons, although the evidence on this is not altogether clear, since low-I.Q. persons may be more socially visible in their acts of sexual deviation.

If this thesis is correct—and to some extent it must be regarded as a tentative formulation—then the question arises: Why is it commonly thought that most adolescents are victims of sexual aggression. There are a number of ways to answer this question. Not all of them are given in this discussion.

There is, first of all, the obvious explanation that the public and the courts come into contact only with those adolescents who are frightened or traumatized by the sexual activity. Only those adolescents who perceive of themselves as victims will bring their cases to the attention of the public or to the juvenile authorities. Adolescents who voluntarily enter into sexual relations with adults—and who, therefore, do not see themselves as exploited—seldom come to the attention of the public or legal authorities. A public and legal image, therefore, is created that the victimized person is the most common. Research evidence leads to the conclusion that this is not the case.

A second explanation lies in the social definitions we are taught regarding when we are to perceive of ourselves as victims in sexual behavior. We are taught to see ourselves as victims when the person is a stranger and we do not voluntarily enter into the act. Involvement with an older person who is a stranger, therefore, is most likely to lead an adolescent to define the situation as one in which he was a victim. Research shows, however, that in sexual relationships involving an older person and an adolescent or child, more often than not the older person who victimizes the child is a close friend or a relative rather than a stranger. Cases involving a close friend or relative are more likely to be dealt with through informal rather than legal means, however, since it is less easy to express indignation against these persons than it is to express it against a stranger. Courts, therefore, tend to get only

those cases where the public definitions lead one to define oneself as a victim and where the adult, therefore, was a stranger.

A third kind of explanation is that the ambiguity in the sexual mores vis-à-vis sexual practices, coupled with the ambivalence most persons have toward sexual aggression, leads to a shared definition that an adolescent involved in any sexual behavior with other persons is a victim of the other person. Regard, for example, the fact that many middle-status parents do not wish to define their children as sexually mature, since this may force them as parents to cope with the sexual maturity of the child on a reality level. So long as the child is regarded as sexually immature, any discovery that their adolescent child is involved in acts of sexual deviation, then, is more likely to be explained on grounds that the child was a victim, since the adolescent is not seen as voluntarily seeking such activity for goal satisfaction. Certainly, parents are relatively unaware that their son, on the average, is more sexually active than he ever will be in his life or that their daughter is about as sexually active as she ever will be, as measured by the average frequency of orgasm in total sexual outlet.²⁵ Among lower-status parents, there probably is greater acceptance of many of the practices, so that there is less ambivalence toward their child's deviation. The lower-status family actually may support the deviation in more subtle ways, even though it may exact conformity at the verbal level.

Public indignation, as already noted, is more likely to reach its peak when acts of sexual deviation involve older persons and adolescents, particularly if they are publicly defined as homosexual or "unnatural" acts. The agencies of law enforcement, adjudication, and treatment also single out these kinds of acts for special consideration. From the police, who are most likely to arrest such offenders, to the courts and the newspapers or gossips, who are most likely to report them, these acts come to be conceived as the most common forms of sex acts involving preadolescents or adolescents when they are not. Let it be clear that no position is taken that public indignation should not be expressed against such acts. The point expressed here is that out of public indignation emerges a conception of reality that these are the major forms of sexual deviation involving adolescents when this is not the case.

To extend the point further, it appears, on reflection, that there is far more heterosexual intercourse among adolescents than any premarital pregnancy figures would disclose, that our social arrangements are likely to foster homosexual relations among persons of the same age and social origins, and that opportunities for sex deviation are related to one's social position in a community and the availability of organizational structures in it that support sex deviation. These social facts, of course, are the major determinants of the process of induction into deviating behavior, whether it is sexual or some other form of normative deviation. They account, too, for the structural variation in deviating behavior.

The moral concern about adolescents being involved in heterosexual coition cannot be adequately dealt with by arrest and adjudication for a number of reasons.

²⁵ KINSEY MALE REPORT 219-20; KINSEY FEMALE REPORT 518-20.

There is, first of all, the fact that it is extremely difficult to detect and apprehend juveniles who engage in premarital coitus. Kinsey and his associates report that their records show fewer than six of each 100,000 copulations are discovered in progress. Furthermore, their records show no instance of legal adjudication arising from any of these discoveries. While some persons are charged with the offenses of premarital coitus, in no instance did the charge arise from actual discovery. Rather, conviction was based on other kinds of evidence and testimony.²⁶ This very difficulty in detection means that those who are detected must necessarily be the objects of selective discrimination, since they represent only a very small proportion of the total population engaging in the behavior.

The police, who are primarily charged with law enforcement, do not usually think of heterosexual intercourse as an offense. This may be so for a number of reasons, including the fact that the sex histories of policemen usually show similar violations in their youth. The point might be generalized, however. Since a substantial proportion of all males and almost nine of every ten lower-status males experience heterosexual intercourse as adolescents, and most of them are not ever discovered or adjudicated as offenders, it seems reasonable to conclude that most males inevitably are ambivalent toward arresting an unmarried adolescent for heterosexual coition, given the punitive action that may follow arrest.

Since premarital coitus is a moral concern to the families of adolescents and since the status reputation of an adolescent girl depends upon her maintaining her social status as a virgin (she may long since have actually lost her virginity), the adolescent peer society makes it difficult to detect and sanction deviation from the norms. Many violations of the sexual conduct norms, in fact, are maintained as a private concern to protect the individual from both the judgment of the peer society and that of the adult society.

Though tangible evidence is generally lacking, Kinsey and others report there is considerable variation in the way judges handle cases of premarital intercourse, depending upon their social origins. They suggest that the closer the social origin of a judge to lower-status origin, the more likely he is to be lenient in adjudication of cases involving premarital coitus.²⁷

There likewise is considerable evidence that the norms of both adolescents and adults do not support either therapeutic or punitive action for acts of premarital coition. It is not the behavioral act of heterosexual intercourse that is to be avoided as much as its consequences. The consequences of contracting a venereal disease, of pregnancy, or of the status of being promiscuous are to be avoided in the view of most adolescents.

Given these fundamental problems in detecting and adjudicating cases of premarital coition among adolescents, together with the problematic aspects of what

²⁶ KINSEY FEMALE REPORT 326.

²⁷ *Id.* at 325; PAUL W. TAPPAN, JUVENILE DELINQUENCY 264 (1949); Lane, *Illogical Variations in Sentences of Felons Committed to Massachusetts State Prison*, 32 J. CRIM. L. & CRIM. 171 (1941).

to do with violators, it seems doubtful that rational legal enforcement of norms is possible. This is not, of course, to deny that heterosexual coition is a problem of moral concern to be dealt with by other institutional forms of organization in the society.

Evidence shows that the homosexual behavior of lower-status adolescent boys—particularly that of career-oriented delinquents—occurs either as an organized form of prostitution or in some exploitative form of "queer-baiting." From the standpoint of the processes of law enforcement and adjudication of offenses, the adult male homosexual who is involved with adolescents should not in most cases be thought of as making the adolescent a victim of his homosexuality. Rather, the adolescent boy in many instances should be viewed as a self-styled delinquent proprietor who purveys an illegal service at a price fixed by fair-trade agreements. The relationship between the adult male homosexual and the lower-status boy is fundamentally rooted in a set of social definitions that the adolescent and the homosexual share as deviators. The relationship is supported by a delinquent subculture and peer society.

There is little doubt, of course, that such behavior affronts public morality and, therefore, is a problem for law enforcement and adjudication. To define it as a criminal violation for the adult homosexual and an exploitation of the juvenile, however, misstates the problem for legal adjudication. Other faulty ideas also interfere with a rational approach to the problem. A punitive approach to the adult male homosexual's offense does not deal with the problem of his homosexuality. To view the delinquent as a homosexual offender would ignore the fact that it occurs within an organized set of understandings commonly referred to as prostitution. It also would ignore the fact that the relationship arises as part of patterned delinquent activity. Making money from "queers" is part of a versatile pattern of career-oriented delinquency. Any legal attempt to deal with the problem under special laws for sex offenders will fail to recognize that fundamentally the act does not represent a sex offense to these boys, but rather an easy way to make money with a minimum of risk. To deal with the problem in moral terms requires a concerted approach to the problem of the prevention of delinquency on the one hand and the problem of adult male homosexuality on the other.

The discussion in this article has in large part proceeded on the assumption that the incidence of sexual deviation in an adolescent population is far greater than statistics on arrest or adjudication show. It has not dealt directly with the question of what would happen if the arrest rate were increased? How would cases be adjudicated? This problem is akin to that which arises for all types of deviation covered by juvenile court statutes. What would happen if we substantially increased the arrest rate for petty thievery, for example? These questions arise, however: Would there be reasons for not increasing the arrest rate? And would there be reasons for handling the sex offender cases differently?

It has already been observed that the problem of deviation from heterosexual pre-

marital intercourse and masturbation norms is probably more realistically a matter for institutional organizations dealing with private morality, unless, of course, the norms governing heterosexual intercourse among adults are violated, such as those for prostitution or public exhibition. Other forms of sexual deviation undoubtedly will continue to be proscribed as institutionalized legal norms, but it is technically difficult to increase the arrest rate for these forms of behavior, given their organized aspects.

The question of what should be done with sex offenders clearly is a difficult one to answer. In attempting to provide an answer to this question, one must bear in mind that the type of sexual deviation influences not only public response, but adjudication and treatment. Should the single girl who is pregnant be placed with the girl who practices homosexuality or the venereally-infected prostitute? Should the unwed mother and the father of the child be dealt with as a unit? Should the career-oriented delinquent who has a sexual liaison with "queers" be treated as a sex offender as well? And, so on. From a social and psychological point of view, much more needs to be known about both the causes of types of sexual deviation and the ways to deal with offenders of each kind before the advisability of increasing the arrest rate or of changing the laws governing the incarceration and treatment of sexual offenders can be seriously considered.

The delinquent boy or girl who is adjudged a recidivist often is sent to an institution for delinquents. There are several different kinds of such institutions, the most common of which is a training school. Such institutions house boys who are guilty of almost any kind of offense, including sex offenses. A basic characteristic of these institutions is that the population is highly segregated on age, sex, and even socioeconomic status lines. Thus, they are generally for adolescent girls or boys from lower-status families. Although some institutions may segregate for therapeutic purposes or programs, these criteria of social differentiation remain.

From a sociological point of view, juvenile institutional populations are the most experienced in sex behavior of any subgroup in the population. Furthermore, as already noted, at least among boys, adolescence is the age for the highest total sexual outlet—*i.e.*, at this age, one finds the highest average frequency of sex acts to orgasm. To institutionalize such an adolescent subgroup is to exacerbate the problem of sex deviation. The institution itself becomes a basis for all forms of homosexual and inhuman sex offenses. Under these circumstances, boys will exploit boys and girls exploit girls.

In delinquent boys' institutions, the most common form of sexual exploitation is that of "punking." A "punk" often is forced to provide a variety of homosexual outlets to the other adolescent boys (although as his status of a "punk" becomes fixed in the status structure of the institution, he may engage in sexual practices in exchange for money or other resources). He may be a fellator, adopt the passive roles in pederasty, bestiality, or "slick-laying," as well as engage in a variety of other homosexual acts. While such acts receive strong negative sanctions from the insti-

tutional personnel and some boys refuse to participate in them, a large number of institutionalized boys come to accept them as alternative forms of sexual gratification. In the words of one such boy, "you ain't got much choice, and after you've been here awhile anythin' looks like it'd do."

There seems little doubt that the typical training school for boys or girls fosters highly deviating sex practices within the institution. Yet, except for the "punk," there is little evidence that the homosexual behavior persists when the boy is released from the institution nor that it persists into adulthood, unless the boy or girl also is institutionalized in a closed institution for a criminal population.

There does not seem to be any necessary reason for sex segregation in the institutional treatment of most delinquent boys and girls. The experimental programs begun several decades ago by August Aichhorn and considerably modified by Bruno Bettelheim at the Sonia Shankman Orthogenic School of the University of Chicago²⁸ and Fritz Redl in the Pioneer House experiments in Detroit²⁹ provide considerable evidence that delinquent boys and girls—even those who are seriously disturbed emotionally—can be treated in the same open institution in a community without fostering the deviating practices so commonly found in training schools. Parenthetically, it must be emphasized, however, that these institutions are not primarily custodial, but treatment institutions organized on the principle of controlling the milieu of the child within the institution and the community, while gradually reintegrating the child into the community. Still, it must be recognized that social science as yet is unable to demonstrate that such institutions will work for delinquent boys and girls who do not present problems of emotional disturbance, but for whom deviant activity, including sex offenses, is primarily the result of socialization in an environment that positively sanctions the deviation—the behavior is normative within the group; it confers status. Despite this reservation, the single-sex institution of the custodial form is no answer to the problem of the boy or girl who is a sex offender.

EPILOGUE

The problem of adjudicating cases involving sex offenses is a very difficult one. The statutes defining juvenile delinquency are sufficiently broad in scope so that any violation of the sex mores of American society can lead to adjudication of the offender as a delinquent. There is no question then of the kind: Are our juvenile laws sufficiently comprehensive so as to cover all violations of the sex mores as acts of delinquency? The questions which seem more appropriate are: Does there seem to be any way of avoiding the arbitrary application of the statutes to delinquent offenders? And are the criminal statutes regarding the relationship of adults with adolescents in sex offenses sufficiently congruent with the social definition of these acts among the participants? There is a further question: Will the public permit the

²⁸ See BRUNO BETTELHEIM, *TRUANTS FROM LIFE* (1955); *LOVE IS NOT ENOUGH* (1950).

²⁹ See FRITZ REDL & DAVID WINEMAN, *CONTROLS FROM WITHIN* (1952); *CHILDREN WHO HATE* (1951).

courts to deal with offenders involved in sex offenses with adolescents or between adolescents themselves in other than punitive terms? Will it accept an approach to the problem that is oriented toward dealing with the causal sequence in the behavior, or will public indignation demand punishment of violators as criminal offenders?

This article has offered some evidence and argument to suggest that private heterosexual behavior involving consent among participants, one or both of whom are adolescents, regardless of their status, cannot be adequately controlled nor can justice be met by legal action. Because it is a moral problem, it is not one for which legal action will be effective. On the other hand, when the heterosexual behavior occurs within such institutional forms as prostitution, or there is clear exploitation or absence of consent on the part of the adolescent, the behavior clearly necessitates legal intervention. How the adolescent is to be dealt with in these situations, however, should be approached in terms of the modern concepts of prevention and treatment.

All other sex behavior, except the private one of masturbation, clearly offends public morality in our society, and the community at large does not appear ready to accept any change in the legal codes regarding these offenses. Despite this limitation, juvenile officials will need to recognize that there is considerable variation in the social organization of these kinds of behavior, so that an approach to the problem where the individual is treated as a sex offender may fail to affect its organized aspects.

Often one hears that the sex mores are changing or that more young people deviate now than hitherto. Such statements may be correct, but they are essentially without proof. They, therefore, cannot form the basis for any change in our legal institutions. The data now available are for a cross-section of some population within the past few decades. They do not tell us how things have changed. To the degree that there have been changes in the mores, however, the sexual act no longer is regarded as deviating (or at least not as serious), and any attempt to buttress the older mores by legal institutional means will make it a relatively ineffective means of control in American society.

Under some concepts of treatment for delinquent adolescents, the adolescent may even escape moral responsibility for the delinquent conduct. The atomistic view of delinquent behavior and treatment that focuses on treating an individual delinquent and a delinquent as an individual is one such conception of treatment. One consequence of this conception is that adjudication and treatment of offenders often fails to regard the delinquent behavior in the context of the moral integration of American society. The norms of adolescent groups, the status of adolescents in the larger social structure, and their behavior as a consequence of these conditions need to become a focal point of concern if the moral integration of the society is to be preserved. The focus on individual violators to the exclusion of the matrix within

which their violation is embedded can only lead to a further destruction of the social and moral integration of the society.

The discussion in this article was offered to show that the failure to accord adolescents a distinct status within the social structure of American society, together with the failure to institutionalize norms governing their behavior as adolescents weakens the moral integration of the total society. It would seem to follow that efforts to define a distinct status position where the expectations are that an adolescent behave as a morally responsible individual within the larger society should alter some of the conditions giving rise to the problems discussed. Attention needs to be focused particularly on what are the culturally-approved goals toward which adolescents are expected to move, what are the means that they may appropriately use to reach them, and what rights and responsibilities are they to have in the total society.

SEX OFFENSES: THE BRITISH EXPERIENCE

J. E. HALL WILLIAMS*

INTRODUCTION

It is now widely recognized, as Sir Norwood East has remarked, that "among the flotsam of modern society sexual offenders require special consideration."¹ But certain questions concerning the way in which they should be handled by the criminal law, and whether and how far they should be regarded as amenable to treatment or fit subjects for imprisonment remain just as vexed as ever they were; and this is no less true in Britain than in the United States or anywhere else. Discussion of these questions has always been bedeviled by the strong feelings that the subject so frequently arouses. "Sexual offenders are more liable to be misjudged by prejudice and ignorance, perhaps, than the majority of criminals."²

The subject will here be examined under three main headings: (1) sexual offenses generally (including sexual offenses against young persons); (2) offenses connected with prostitution; and (3) homosexual offenses. With regard to each of these, it is proposed to show what the statistical picture has been in Britain at various times up to the present day, how the community has responded to the various problems presented to it from time to time, and what changes in the law have been suggested and/or implemented.

We have a long history of public concern and controversy about each of these three aspects of the subject in Britain. It was this that led to the appointment of the Departmental Committee on Sexual Offences against Young Persons, which reported in 1925;³ the Street Offences Committee, which reported in 1928;⁴ and the recent Wolfenden Committee on Homosexual Offences and Prostitution, which reported in 1957.⁵ Reference will also be made, among other sources, to the so-called East-Hubert Report of 1939,⁶ the so-called Cambridge Report of 1957,⁷ the Sexual

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¹ W. NORWOOD EAST, *SOCIETY AND THE CRIMINAL* 91 (1949). See also, by the same author, *Sexual Offenders*, in L. RADZINOWICZ & J. W. C. TURNER (Eds.), *MENTAL ABNORMALITY AND CRIME* ch. 9 (1944).

² W. NORWOOD EAST, *SOCIETY AND THE CRIMINAL* 92 (1949).

³ Departmental Committee on Sexual Offences against Young Persons, *Report*, CMD. No. 2561 (1925) [hereinafter cited as CMD. No. 2561].

⁴ Street Offences Committee, *Report*, CMD. No. 3231 (1928) [hereinafter cited as CMD. No. 3231].

⁵ Committee on Homosexual Offences and Prostitution, *Report*, CMND. No. 247 (1957) [hereinafter cited as CMND. No. 247].

⁶ W. NORWOOD EAST & W. H. DEB. HUBERT, *REPORT ON THE PSYCHOLOGICAL TREATMENT OF CRIME* (1939) [hereinafter cited as EAST-HUBERT REPORT].

⁷ CAMBRIDGE DEPT OF CRIMINAL SCIENCE, *SEXUAL OFFENCES* (1957) [hereinafter cited as CAMBRIDGE REPORT].

Offences Act, 1956,⁸ and the Street Offences Act, 1959,⁹ to mention some of the main supplementary sources.

I

SEXUAL OFFENSES GENERALLY (INCLUDING SEXUAL OFFENSES AGAINST YOUNG PERSONS)

A. The Departmental Committee on Sexual Offences against Young Persons, 1925

The genesis of this Committee lay in the public concern over the undoubted rise in the number of sexual offenses against young persons immediately after World War I and the belief held in some quarters that inadequate penalties were sometimes imposed by the courts. There was also a feeling that those who committed sexual offenses against young persons were often mentally abnormal and ought more frequently to be dealt with as such. These matters were brought to a head following a debate in the House of Commons in July 1923; and in March 1924, two conferences were convened at the Home Office at which persons representing various societies and organizations interested in the subject were present, at the invitation of the Home Secretary. It was there urged that a committee should be appointed to investigate the actual prevalence of these offenses in England and Wales.¹⁰

The Committee was set up in July 1924 and reported in December 1925.¹¹ It was charged with the duty of collecting information and taking evidence about the prevalence of sexual offenses against young persons and "indicating any direction in which . . . the law or its administration might be improved."¹² Evidence was received from many witnesses, including judges, magistrates, police, doctors, and social workers, and the Committee's Report contains a comprehensive survey of this particular area of the criminal law and much that is of interest concerning sexual offenses generally.

No less than forty-three recommendations were made by the Committee, not very many of which, it would appear, were implemented. The Times described the Committee's Report as stating with admirable restraint the facts of the situation and suggesting remedies that were neither extreme nor violent.¹³ The Report shows that it is not really possible to typify these sexual offenders: offenses against young persons were committed by a wide variety of different persons, not all of whom were suffering from any kind of mental disorder. Important recommendations were made concerning the need for medical examinations after conviction, but The Times thought that the most valuable part of the Report was that devoted to the ways and means whereby trial procedure could be improved to insure a full and fair trial without doing further harm to the children concerned.¹⁴

⁸ 4 & 5 Eliz. 2, c. 69.

⁹ 7 & 8 Eliz. 2, c. 57.

¹⁰ CMD. No. 2561, para. 2, at 5.

¹¹ A separate committee was appointed for Scotland and reported in 1926. CMD. No. 2592. Except where indicated, the references and figures in this article relate to England and Wales.

¹² CMD. No. 2561, at 3.

¹³ The Times (London), Dec. 22, 1925.

¹⁴ *Ibid.*

The Committee's most controversial proposal was that the age at which the consent of a female to a sexual act should be a good defense should be raised from sixteen to seventeen years: the Committee was itself divided on this issue, some members being against any change, others urging that the age should be raised to eighteen years.¹⁵ The Committee's recommendation has never been implemented. It was also proposed that the defense of reasonable belief that a girl was above the age of sixteen years, which is available to a first offender under twenty-four years of age, by virtue of the Criminal Law Amendment Act, 1922,¹⁶ should be abolished;¹⁷ but this provision still remains part of English law.

Many other recommendations made by the Committee had to await implementation until the Children and Young Persons Act, 1933;¹⁸ but in September 1926, the Home Office issued a memorandum to magistrates and police calling attention to the sections of the Committee's Report that could be given effect without legislation.¹⁹ It seems to have been the general opinion at the time that the Report represented a distinct advance on this difficult problem.²⁰ The Times thought that the measures of prevention proposed in the Report were of greater importance than changes in the law.²¹

1. *The statistical picture*

The results of the statistical inquiry conducted by the Committee revealed that although there had been no change in regard to the number of offenses of incest and indecent exposure, and a decline in the number of offenses of rape, the number of cases of indecent assault had increased fairly sharply since the end of World War I.²² This trend was contributed to by a tendency to reduce a more serious charge to one of indecent assault in order to have the proceedings completed sooner by way of summary trial, rather than prolong the case by committing to trial at Assizes. "Various reliable sources of evidence incline us to the view," the Committee said, "that this is frequently done in the interests of the child."²³ But even when allowance was made for this contributing factor, the Committee was satisfied that there had been a distinct increase in indecent assaults on boys and girls under sixteen years of age.²⁴

One might comment here that the proportionate increase was nothing like so grave as that which occurred after World War II, details of which are provided in the Cambridge Report. The records from 1937 to 1954 are there analyzed, and it is shown that the proportionate increase in the number of indictable sexual offenses

¹⁵ CMD. No. 2561, para. 38, at 22-24, and recommendation 4, at 84. But see the memorandum of dissent by 3 members of the Committee against any change, *id.* at 89; and the memorandum by Miss E. H. Kelly in favor of altering the age to 18. *Id.* at 90-93.

¹⁶ 12 & 13 Geo. 5, c. 56.

¹⁷ CMD. No. 2561, para. 39, at 24-26, and recommendation 5, at 84. But see the memorandum of dissent by 2 members of the Committee. *Id.* at 93-94.

¹⁸ 23 & 24 Geo. 5, c. 12.

¹⁹ *Id.* Dec. 23, 1925.

²⁰ CMD. No. 2561, paras. 5-18, at 6-15, esp. para. 8, at 8-9.

²¹ *Id.* para. 9, at 9.

²² See The Times (London), Sept. 18, 1926.

²³ *Id.* Dec. 22, 1925.

²⁴ *Id.* para. 18, at 15.

known to the police between 1937 and 1954 was 252 per cent, compared with an approximately sixty per cent increase for all categories of indictable offenses.²⁵ Again, between 1947 and 1954, the offenses of defilement of girls under thirteen years of age known to the police rose by 82.6 per cent, and the offenses of defilement of girls between thirteen and sixteen years of age rose by 98.5 per cent;²⁶ whereas the 1925 Committee was not seriously concerned about these categories.²⁷ It was the increase in the number of indecent assaults that worried the Committee; and, of course, it recognized that there were many more sexual offenses against young persons than the number actually reported.²⁸

2. *Medical examination after conviction*

The Committee recommended that in all cases of indecent exposure, and in all cases of sexual offenses against young persons where the offender has previously been found guilty of a sexual offense or where the court suspects mental disease or defect, there should be a compulsory medical examination after conviction but before sentence.²⁹ The court should take into account the report of the medical examination in its disposition of the offender.

The difficulty in implementing this kind of recommendation is usually said to be the shortage of trained psychiatrists, but it was not for this reason that the Committee appears to have refrained from making any more general requirement for a compulsory medical examination. It is true that the Committee recognized the difficulties that some magistrate courts experienced in obtaining expert reports, and it suggested a solution.³⁰ But it seems that the Committee rather regarded psychiatry as "an obscure branch of science" not yet fully developed, and it suggested that it would be in the interest of the advancement of medical knowledge if some of the difficult borderline cases could be subjected to systematic examination.³¹

The recommendation was not implemented, and the Cambridge Report shows that apart from medical inquiries where insanity or mental deficiency was suspected, an offender was hardly ever remanded for a medical report before being sent to prison, even where repeated sentences of imprisonment were imposed.³² There is clearly room for improvement here. The Wolfenden Committee has made a limited proposal in this direction concerning young persons under twenty-one years of age convicted of a homosexual offense.³³

3. *Habitual sex offenders*

The evidence that the Committee received about habitual sexual offenders does not seem to have borne out the popular idea of the sexual offender against young persons as a hopeless recidivist. "We find that, except in cases of indecent exposure

²⁵ CAMBRIDGE REPORT 3-6.

²⁶ *Id.* table I, at 12.

²⁷ CMD. No. 2561, para. 8, at 9.

²⁸ *Id.* para. 18, at 15.

²⁹ *Id.* para. 80, at 58-59, and recommendation 28, at 86.

³⁰ *Id.* para. 81, at 59, and recommendation 29, at 86.

³¹ *Id.* para. 80, at 58.

³² CAMBRIDGE REPORT 184, 187.

³³ See *infra* p. 358, and CMD. No. 247, paras. 181-89, at 62-65.

and to a lesser extent in indecent assault, it is not common for the sexual offender to have been previously convicted of a similar offence.³⁴ But in cases of indecent exposure, gross indecency, and indecent assault, "the lists of previous convictions are sometimes very long" and no punishment appears to have acted as a deterrent.³⁵

The Committee considered that special action was called for in such cases. Where mental examination reveals that the offender is certifiable as insane or a mental defective, that should solve the problem; but³⁶

where there is no disease or disorder we believe that there would be support for the prolonged detention of men who appear quite incapable of abstaining from indecent exposure or from committing repeated indecent assaults on children.

The Committee recommended that consideration should be given to the possibilities of the prolonged detention in suitable institutions of those who repeatedly commit indecent offenses against young persons. It recognized that "the public mind is distrustful of any kind of indeterminate sentence," but it believed that a prolonged period of detention in a special institution might occasionally effect a cure; and in any case, it would protect the public more effectively than repeated short terms of imprisonment.³⁷

The East-Hubert Report has some bearing on this matter. It was the report of a comprehensive investigation carried out at Wormwood Scrubs prison during the four years commencing March 1934, in order to ascertain the value of psychological treatment in the prevention and cure of crime.³⁸ Much of it is generally relevant to our subject of sexual offenders, and part three of the Report is specifically devoted to a special consideration of sexual offenses. It is pointed out that the short sentences that are so frequently imposed for such offenses as indecent exposure are often insufficient to enable any psychotherapeutic treatment to be effective.³⁹ It was recommended that a special penal institution be set up to deal with abnormal types of criminal. The purposes to be served by such an institution would have to be carefully defined, however, otherwise it would soon be rendered useless and, in fact, unworkable by a flood of unsuitable material; for there would be a natural tendency to refer to the institution any case that presented a problem to the public conscience, judicial authorities, and others.⁴⁰ The Report outlines the four functions that its authors believed such an institution would serve. These include not only the treatment of persons likely to benefit from psychiatric treatment, but the detention of those who are not, "for whom reformatory measures, however specialized, seemed useless and the severity and hardship of ordinary prison life inappropriate."⁴¹

The proposal to set up a psychiatric prison-hospital, along the lines suggested in

³⁴ CMD. No. 2561, para. 83, at 60.

³⁵ *Ibid.*

³⁶ *Id.* at 61.

³⁷ *Ibid.* and recommendation 30, at 86.

³⁸ See the letter submitting the Report to the Home Secretary, December 1938. EAST-HUBERT REPORT

ii.

³⁹ *Id.* para. 171, at 158.

⁴⁰ *Id.* para. 163, at 155.

⁴¹ *Id.* para. 172, at 159.

the East-Hubert Report, has been accepted by the Prison Commission, and work has already begun on a site at Grendon Underwood, Bucks, where about 300 beds will be made available some time in 1962. With a total prison population of over 26,000, it seems likely that those needing psychiatric treatment and likely to respond will occupy most of the accommodation there. The Wolfenden Committee on Homosexual Offences and Prostitution thought that the number of homosexual offenders who would be sent to this institution would be small:⁴²

To send them to this particular institute would presuppose that they were proper subjects both for the forms of treatment it would provide and for living together with its other members. For a few carefully selected persons this might well be the best solution; but it cannot be a general answer to the problem.

Apart from the laws dealing with habitual offenders generally, we have never enacted in Britain any special criminal law dealing with the habitual sex offender. But the new Mental Health Act, 1959, will, when it comes into force, enable the courts to order the detention of persons found guilty of criminal offenses in a mental hospital on the grounds of mental disorder or to make a guardianship order under the Act.⁴³ The court will have to be satisfied on the evidence of two medical practitioners, at least one of whom must be specially experienced in the diagnosis of mental disorders, that the offender is suffering from mental disorder (which is defined to include psychopathic disorder) and that the mental disorder is of a nature and degree that warrants the detention in a mental hospital or the making of an order for guardianship; and the court must be of the opinion "having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him," that this is the most suitable method of disposing of the case.

Under this new mental health law, psychopathic disorder is recognized for the first time by that name in English law. Section 4(4) defines "psychopathic disorder" as

a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment.

There have been some misgivings about the recognition of this new category of mental disorder, in both medical and legal circles,⁴⁴ and a distinguished sociologist has recently published a devastating attack upon the whole concept.⁴⁵ All that can be said at this stage is that some persistent sexual offenders may well be dealt with

⁴² CMND. No. 247, para. 207, at 70.

⁴³ 7 & 8 Eliz. 2, c. 72, § 60.

⁴⁴ See A. H. Edwards, *The Mental Health Bill: Summary and Legal Considerations*, 9 BRIT. J. DELINQ. 291 (1959); Scott, *The Mental Health Bill and the Psychopath, I*, id. at 293; Jones, *The Mental Health Bill and the Psychopath, II*, id. at 300. See also Norval Morris's comments on the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, *Report*, CMND. No. 169 (1957), in 21 MODERN L. REV. 63 (1958).

⁴⁵ BARBARA WOOTTON, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY* esp. 249 *et seq.* (1959).

under this new law when it comes into effect. But it is unlikely that all sexual or other psychopaths will be so dealt with, and most of them will probably continue to find their way into our penal institutions, where they are a constant source of anxiety and embarrassment to the prison authorities.

4. *Fines*

It is of interest to recall that the 1925 Committee did not believe that fines were suitable for dealing with sexual offenses against young persons, a point of view that recognized and reflected the evidence of witnesses representing large bodies of social workers.⁴⁶ There is a strange parallel in the 1949 report of the Joint Committee on Psychiatry and the Law appointed by the British Medical Association and the Magistrates' Association, entitled *The Criminal Law and Sexual Offenders*. This Committee concluded that⁴⁷

fines should not be imposed on sexual offenders, except in cases where such offenders, after a finding of guilt, refuse to acknowledge their offence, or refuse, or are unable to co-operate in treatment.

But, as the Cambridge Report observes, the attitude of the courts seems to be different. Indeed, there is no other remedy that was more frequently used for sexual offenses in general than the fine.⁴⁸ Nevertheless, it should be noted that the 1925 Committee's recommendation against the use of fines is limited to offenses of indecent assault against young persons. An examination of table forty-four in the Cambridge Report shows that the fine is, in fact, less frequently used in the case of offenses against young males and females.⁴⁹

In the homosexual class it was found that the fine was rarely used for adult offenders who had committed offences against boys [defined as males under sixteen years of age] unless the offence had been either trivial or the offender appeared unlikely to offend again.⁵⁰

5. *Probation*

The 1925 Committee thought that probation was "sometimes suitable where a fine is not. This is especially the case with young offenders." But the opinion is expressed that "probation in cases of sexual offenders should be used with caution."⁵¹ The evidence of the Cambridge Report is that the courts used probation "for no more than 16 per cent of persons found guilty of sexual offences," and less frequently for homosexual than for heterosexual offenses.⁵² This is explained by the large percentage of homosexual offenders who are fined (sixty-six per cent).⁵³ The majority of those placed on probation were convicted of either indecent assaults or indecent exposure,⁵⁴ and a high proportion of persons who had committed offenses against boys under sixteen years of age were placed on probation (eighteen per cent).⁵⁵

⁴⁶ CMD. No. 2561, para. 85, at 62.

⁴⁸ CAMBRIDGE REPORT 218.

⁵⁰ *Id.* at 219.

⁴⁹ CAMBRIDGE REPORT 236.

⁵¹ *Id.* at 238.

⁴⁷ Para. 63, at 22.

⁴⁹ *Id.* at 220.

⁵³ CMD. No. 2561, para. 86, at 62.

⁵² *Ibid.*

⁵⁵ See *id.* table 47, at 237.

6. Imprisonment

On imprisonment, the 1925 Committee found evidence of very inadequate sentences in certain cases, having regard to the nature of the offense.⁵⁶ The Committee gave instances of specific cases where the sentences (of from one to four months) were regarded as inadequate. No recommendation was made on this subject, save that the courts should pay heed to the following general considerations when dealing with a man who has committed a sexual offense against a young person:

- a. The contrast between very light sentences given for sexual offenses against young persons and the far heavier ones given for offenses against property "not only shocks all right-minded people but also tends to instil in the community a false sense of values, and to lower the public tone on moral questions."
- b. It may be desirable in some cases in the interests of the child to remove the offender from the neighborhood for a long period.
- c. In all cases of sexual assault, the public mind is reassured to some extent if it knows that the offender is shut off from society for some considerable time, and prevented from doing further harm.⁵⁷

The Cambridge Report reveals that more than half of those who had committed sexual offenses against children were sent to prison, compared with twenty-five per cent of all offenders brought to justice.⁵⁸ Two-thirds of the total number of sexual offenders were detained for short periods not exceeding six months.⁵⁹ But the conclusions drawn in 1957 from these findings are rather different from those reached in 1925. The preponderance of short sentences is said to indicate that the attention of the court was not directed towards reformatory treatment, but towards punishment and the possible deterrence of others.⁶⁰ For it is now widely held that no effective training can be achieved during a short sentence, which is not, therefore, interpreted as having been imposed for that purpose.⁶¹ Moreover, the Cambridge Report says that⁶²

it often appeared that the courts regarded the mentality of [offenders] as not fundamentally different from those who had, for instance, committed offences against property.

But surely, if this is the case, it could be regarded as the very result that the 1925 Committee felt was desirable. It is clear that different interpretations can be placed upon the evidence. In 1925, short sentences were condemned for different reasons than those advanced in 1957 as a basis of criticism. The courts, however, continue to impose them, and the law still allows this to be done.

One of the more interesting findings of the Cambridge Report is the frequency with which sexual offenders have a record of offenses that are not sexual, but include

⁵⁶ CMD. No. 2561, para. 88, at 63.

⁵⁷ *Id.* at 64.

⁵⁸ Compare CAMBRIDGE REPORT 215, with *id.* at 183.

⁵⁹ *Id.* at 215.

⁶⁰ *Id.* at 191.

⁶¹ See the views of the Howard League for Penal Reform summarized in ADVISORY COUNCIL ON THE TREATMENT OF OFFENDERS, ALTERNATIVES TO SHORT TERMS OF IMPRISONMENT para. 4 (1957).

⁶² CAMBRIDGE REPORT 191.

such crimes as breaking and entering, and stealing. Nearly one in five of those convicted of sexual offenses for the first time had previous convictions of nonsexual offenses.⁶³ This curious fact is explicable in many different ways. It may be that it is the institutional experience as a result of prior imprisonment that has altered the sexual pattern of behavior. Or it may be that these property crimes are capable of being regarded a part of the syndrome of sexual deviance. As Sir Norwood East has emphasized, the psychiatrist may well see in offenses that are not strictly speaking sexual evidence that points to the crime having been committed for sexual reasons. Although sexual offenders are usually thought of only in connection with the recognized sexual offenses,

the medical conception is wider and includes cases of theft, housebreaking, burglary, common assault and murder if the offence has for its purpose the immediate or delayed gratification of normal or abnormal sexuality.⁶⁴

B. The Sexual Offences Act, 1956 and Law Reform

A complete consolidation of the English law relating to sexual offenses generally took place under the authority of the Consolidation of Enactments (Procedure) Act, 1949,⁶⁵ and was embodied in the Sexual Offences Act, 1956, which came into effect on January 1, 1957. The Act does not effect any substantial change in the law relating to sexual offenses, but simply brings it together in a convenient form within the confines of a single Act of Parliament. The penalties remain substantially unrevised, and the legal definitions of the different offenses are substantially the same.

That there are some deficiencies in the way the law defines offenses in this field has been amply demonstrated by the courts in recent years, and when the Criminal Law Revision Committee was set up in February 1959, one of the first subjects referred to it for consideration was the law relating to indecency with children.⁶⁶ Cases had shown that where a person, without committing an assault, invites a child to handle him indecently, no offense of indecent assault is committed.⁶⁷ The Committee's First Report, published in August 1959,⁶⁸ recommends that the law be changed in such a way as to stop up this gap in the law that the decisions of the courts have revealed; and the proposals have been generally welcomed.⁶⁹

Whether any further changes are needed in the English criminal law relating to sexual offenses, other than a review of the penalties provided, it is difficult to say. On the subject of the legal penalties, a comprehensive review of the whole structure of the English law has been recommended by a committee appointed by JUSTICE (the British Section of the International Commission of Jurists) on which the present

⁶³ *Id.* at 155.

⁶⁴ W. NORWOOD EAST, *SOCIETY AND THE CRIMINAL* 94 (1949).

⁶⁵ 12, 13 & 14 Geo. 6, c. 33.

⁶⁶ For the Committee's terms of reference, see the White Paper entitled *Penal Practice in a Changing Society, Aspects of Future Development*, CMND. No. 645, para. 15 (1959) (England and Wales).

⁶⁷ See, e.g., *Fairclough v. Whipp*, [1951] 2 All E.R. 834 (D.C.); *D.P.P. v. Rogers*, [1953] 1 Weekly L.R. 1017 (D.C.); and *Williams v. Gibbs*, [1958] Crim. C. & C. 138 (D.C.)

⁶⁸ Criminal Law Revision Committee, *First Report (Indecency with Children)*, CMND. No. 835 (1959).

⁶⁹ See editorial comment, 1959 CRIM. L. REV. 682-83 (1959).

writer was privileged to serve.⁷⁰ Certain anomalies were observed by the Wolfenden Committee in connection with homosexual offenses and prostitution.⁷¹ In the wake of each sensational sexual crime or series of crimes, there arises a demand for heavier penalties (including capital punishment for sexual murder) or for providing better protection for the community in some way.⁷² One idea canvassed recently, after the murder of a little girl of four by a known sexual pervert, was for the creation of a register of sexual offenders and their addresses, similar to the California register. Another suggestion was for the provision of a special institution for sex offenders against young children. The Home Office has not given any encouragement to these extreme solutions, and the official hope is that we can get by without resort to them.⁷³

II

OFFENSES CONNECTED WITH PROSTITUTION

Much of the early concern with prostitution was connected with the suppression of the white slave traffic, in which international organizations have taken a prominent part.⁷⁴ But the more general problems created by the streetwalker have also been the concern of women's organizations in Britain, and there is a long history of attempts to change the law.⁷⁵ Prior to the Report of the Wolfenden Committee on Homosexual Offences and Prostitution, in 1957, the most comprehensive examination of the problem of street offenses was that carried out by the Street Offences Committee, a departmental committee that reported in 1928.

A. The Report of the Street Offences Committee, 1928

Set up in October 1927, this Committee, presided over by Rt. Hon. Hugh Macmillan, K.C., issued its Report in November 1928. It was charged with the duty of inquiring into⁷⁶

the law and practice regarding offences against the criminal law in connection with prostitution and solicitation for immoral purposes in streets and public places and other offences against decency and good order, and to report what changes, if any, are . . . desirable.

Again, as with the 1925 Committee, a wide variety of evidence was collected from civil servants, magistrates, probation officers, and other social workers connected with

⁷⁰ JUSTICE, LEGAL PENALTIES, THE NEED FOR REVALUATION (1959).

⁷¹ See, e.g., CMND. No. 247, para. 100, at 37, which refers to the fact that the maximum penalty for indecent assaults on males is ten years' imprisonment, compared with two years' for indecent assault on a female.

⁷² See the question asked by Mr. Osborne in the House of Commons, April 16, 1959. 603 H.C. DEB. (5th ser.) 1124 (1959).

⁷³ See the adjournment debate on the motion by Mr. Frederic Harris, M.P., on the protection of children (sexual offenses). 578 H.C. DEB. (5th ser.) 165 *et seq.* (1957). The Home Office reply was given by the Joint Under-Secretary of State for the Home Department (Mr. J. E. S. Simon). *Id.* at 169 *et seq.*

⁷⁴ See a brief account in CMND. No. 247, paras. 342-43, at 111-12.

⁷⁵ See CMD. No. 3231, paras. 26-32, at 14-16.

⁷⁶ *Id.* para. 2, at 5.

the courts, prison officers, and police, as well as from members of the public and representatives of the many organizations interested in the subject.

The Committee began its work by surveying the existing laws and discussing some general considerations of policy. It is pointed out that⁷⁷

in the region of sexual offences, the common law has never taken upon itself the prohibition by criminal sanctions of voluntary illicit intercourse between the sexes, but has confined its intervention to the grosser breaches of sexual morality, such as those which are of unnatural form or aggravated by violence. Neither prostitution nor solicitation are words in themselves descriptive of any offence at common law,

and the penal law on this subject is founded upon special legislation, rather than on any general principle of the common law.

The statute law, moreover, has not been found in any one general enactment or series of enactments, but has been located both in England and Wales and in Scotland in a series of more or less miscellaneous provisions.⁷⁸ The position is further complicated by the existence of local by-laws, whereby local government authorities have power to control public parks and places of recreation; and harbor, dock, and railway authorities have similar powers over their premises. A collection of these statutory enactments is printed in appendix three of the Committee's Report.⁷⁹

1. *Law and morals*

The first observation made by the Committee in its discussion of general considerations of policy is that the subject matter of their terms of reference lay on the borderline between law and morals, and "there is no frontier more controversial."⁸⁰ It pointed out that in general, the law is not concerned with private morals or with ethical sanctions, but it is concerned with the outward conduct of citizens in so far as that conduct injuriously affects the rights of other citizens. It has always been thought right to bring certain forms of conduct within the scope of the criminal law on account of the injury that they occasion to the public in general. It is within this category of offenses, if anywhere, that public solicitation for immoral purposes belongs.

But it should be realized, the Report continues, that the law is concerned with such immorality as gives rise to indecency not because of its immorality, but because of its offensiveness. Certain citizens may so abuse the general rights to use the streets as to amount to an interference with the enjoyment of that right by other citizens. "While immoral relations between sexes may be no concern of the law, solicitations to immorality may be so conducted as to be offensive to the public." The criterion here is what offends "the average sensibility of the man or woman in the street."⁸¹

Two alternative courses were advocated before this Committee. On the one

⁷⁷ *Id.* para. 8, at 8.

⁷⁸ *Id.* para. 10, at 8; see also para. 10-15, at 8-10.

⁷⁹ *Id.* at 38-49.

⁸⁰ *Id.* para. 16, at 10.

⁸¹ *Id.* para. 18, at 11-12.

hand, it was proposed that all legislation specifically dealing with solicitation for immoral purposes should be abolished, as had been proposed in 1926.⁸² According to this school of thought, ably expounded by many women's organizations, instead of such discriminatory legislation against soliciting by women, in future there should be in its place a general offense, applicable to both sexes, involving wilfully causing annoyance to any person by words or behavior in any street or public place. The other argument was that the law of England and Wales should be brought into line with that in Scotland by abolishing the requirement of annoyance, so that soliciting in the streets should henceforth become an offense per se, as an abuse of the public right to use the streets and an affront to public decency.⁸³

2. *The solution proposed*

The Committee did not find itself in agreement with either of these extreme views. It did not think it was expedient to abolish altogether the provisions of the criminal law dealing with solicitation for immoral purposes. "The law has always singled out various types of conduct in the streets for special treatment."⁸⁴ With regard to the requirement of proof of annoyance, the Committee noted that despite a long history of attempts to persuade Parliament to deal with this difficult problem, going back as far as 1882, no progress had been made, but it recognized that the requirement did create real difficulty where it had to be proved, arising from the reluctance of the person or persons solicited to give evidence. To overcome this difficulty, the courts have accepted the evidence of police officers that annoyance was caused—evidence which is often perfunctory.⁸⁵

The Committee preferred that an objective criterion be applied to the conduct in question, so that police evidence would be directed to the nature of the conduct itself rather than to its mental effect upon the persons towards whom it is exhibited.⁸⁶ It suggested that the word "importune" should be employed to express the kind and degree of solicitation of which the law should take cognizance. By this, it understood conduct which is insistent and harassing. Evidence of an observer, such as the police officer making the arrest, could properly be directed to the objective question of importuning.⁸⁷ The Committee proposed a single enactment to replace the existing multifarious provisions of the law in England, Wales, and Scotland, directed against solicitation in the streets and aimed at every person who in any street or public place importunes any person of the opposite sex for immoral purposes.⁸⁸

One consequence of the Committee's solution was that the accused person would no longer be charged as a "common prostitute" and thereby have revealed to the court, before the main issue of guilt had been decided, the damaging fact of her previously having a record of prostitution. This requirement of the law had been strenuously opposed by the women's organizations for the reason already explained,

⁸² Public Places (Order) Bill, 1926.

⁸⁴ *Id.* para. 25, at 14.

⁸⁶ *Id.* para. 35, at 17.

⁸⁸ *Id.* para. 37, at 17.

⁸³ *Id.* para. 22, at 13.

⁸⁵ *Id.* para. 33, at 16.

⁸⁷ *Id.* para. 36, at 17.

and also because the retention of the term "common prostitute" tended to brand convicted women and render their rehabilitation more difficult.⁸⁹ Equally strong objections were raised against any change on the ground that the present law constitutes a valuable protection to innocent women.⁹⁰ The Committee received very little evidence to show that women who were not prostitutes had been charged; and it concluded that the expression "common prostitute" should be omitted from any redefinition of the offense of importuning along the lines that it proposed, and that the law should be drafted in general terms applicable to persons of either sex.⁹¹

The Committee also favored the substitution of a new offense dealing with persons frequenting a street or public place for the purposes of prostitution or solicitation so as to cause a nuisance, in place of the existing legislation dealing with prostitutes loitering, as distinct from actively importuning, for immoral purposes. The evidence of one or more persons aggrieved should be essential to secure a conviction.⁹² There were also a number of minor recommendations that it is unnecessary to discuss in this paper.

3. *Cautions and penalties*

It is important to record that the Committee favored the practice that it found was already followed in some places—in particular, the city of Edinburgh—whereby warnings or cautions were given to offenders the first time they were caught soliciting, instead of an immediate arrest. It thought this should be prescribed in all police orders as a general rule of procedure,⁹³ but it was not until thirty years later, after a further recommendation by the Wolfenden Committee, that this was actually done.⁹⁴

On the subject of penalties, the Committee recommended that the maximum penalties be revised. For a first offense, the maximum penalty should be unchanged, a fine of forty shillings being the usual maximum penalty available. But for second and subsequent offenses, it recommended that increased penalties be imposed, with a power of imprisonment without the option of a fine in the case of repeated offenses. The latter was recommended "with a view especially to enforcing conditions of probation and facilitating reformatory methods of treatment."⁹⁵ The close similarity in the recommendations of the Wolfenden Committee is not without interest.⁹⁶

⁸⁹ *Id.* para. 39, at 18-19.

⁹⁰ *Id.* para. 40, at 19.

⁹¹ *Id.* para. 41, at 19.

⁹² *Id.* para. 38, at 18. See the summary of recommendations. *Id.* at 28. Sir L. Dunning thought this proposal would be a dead letter from the start because it required the evidence of aggrieved persons. THE CHURCH OF ENGLAND MORAL WELFARE COUNCIL, THE STREET OFFENSES BILL, para. 21, at 12 (1959), recognized this difficulty and tried to avoid it.

⁹³ CMD. No. 3231, para. 55, at 24.

⁹⁴ See *infra* p. 349.

⁹⁵ CMD. No. 3231, para. 61, at 26-27.

⁹⁶ See *infra* p. 349.

B. The Report of the Wolfenden Committee on Homosexual Offences
and Prostitution, 1957

The Wolfenden Committee was set up in August 1954 as a departmental committee to consider the law and practice relating to homosexual offenses and offenses against the criminal law in connection with prostitution and solicitation for immoral purposes, and to report what changes, if any, were desirable. It reported in September 1957, and as a result of the recommendations concerning prostitution and solicitation, the Street Offences Act, 1959, was passed and is now in force.

1. *The statistical picture*

The Committee's task with regard to the second part of its terms of reference undoubtedly stemmed from the recognition that the visible and obvious presence of large numbers of prostitutes in the streets of some parts of London and of a few provincial towns was a matter of grave public concern.⁹⁷ Whether, in fact, there has been an increase in the actual number of prostitutes the Committee was unable to find out,⁹⁸ but there certainly had been a sharp rise in the number of prosecutions. The statistical picture presented in table twelve of appendix two of the Wolfenden Report, an extract of which follows, is not a pretty one, showing as it does that the number of prosecutions has risen sharply in recent years:⁹⁹

<i>Street Offences (England and Wales)</i>		
<i>Year</i>	<i>Number of prosecutions</i>	<i>Number of convictions</i>
1938	3,280	3,192
1946	4,423	4,393
1952	10,319	10,291
1955	11,916	11,878

This picture is even more alarming when supplemented by the 1958 figures, as follows:¹⁰⁰

1958	19,663	19,536
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Of course, the Committee recognized that the increases in these figures might simply reflect an increase in police activity in this direction, which, in turn, might well depend on public opinion.¹⁰¹

2. *The main defects in the law and their solution*

The Committee reviewed the law in much the same way as its predecessor had done, but it came to slightly different conclusions. It also found that there were two main defects in the way in which the law defined solicitation. The first was the element of annoyance, which, although not part of the law of Scotland, had to be

⁹⁷ CMND. No. 247, para. 229, at 81.

⁹⁸ *Id.* para. 232, at 82.

⁹⁹ *Id.* at 143.

¹⁰⁰ Extracted from Great Britain Home Office *Criminal Statistics (England and Wales)*, CMND. No. 803, table D, at 14, and table 2, at 27 (1958) [hereinafter cited as CMND. No. 803].

¹⁰¹ CMND. No. 247, para. 231, at 81.

proved in every contested case in England and Wales. The second was the use of the term "common prostitute" as part of the definition of the offense.¹⁰²

With regard to the requirement of annoyance, as we have seen, there had been a long history of complaint. The Street Offences Committee had found it objectionable, as did many witnesses before the Wolfenden Committee. The main objection was that proof of annoyance was usually based on a police officer's estimate of the state of mind of the person accosted, who was not himself called to give evidence. The Wolfenden Committee recommended that this requirement be eliminated;¹⁰³ and this has now been done by virtue of the Street Offences Act, 1959, which repeals the multifarious laws on this subject and substitutes a more simple general offense.¹⁰⁴

With regard to the use of the description "common prostitute," it was argued very strongly before the Wolfenden Committee, as before its predecessor, that this was unjust, in that it selects a special class of women and subjects them to penalties without seeking to punish their customers; and "if there were no customers there would be no prostitutes." Not only this, but they are penalized by having this designation affixed to them from the start of the proceedings, which introduces a wholly unfair presumption of guilt. Moreover, having this label attached to them tends to make their reformation more difficult.¹⁰⁵

The Committee did not accept these contentions about the label "common prostitute," saying that it received neither evidence that prostitutes themselves felt a grievance or feared injustice on this score nor evidence that it had interfered with their reformation.¹⁰⁶ The Committee tried to arrive at some alternative formula that would safeguard innocent persons from arrest by using the notion of habitual or persistent conduct; but in the end, it concluded that this was impracticable and that on balance, it was better to retain the words "common prostitute" in the definition of the offense.¹⁰⁷

This conclusion has been criticized and attacked, though without success, by bodies such as the Church of England Moral Welfare Council and in the parliamentary debates on the Street Offences Bill;¹⁰⁸ but the new Act retains the phrase "common prostitute" as part of the definition of the offense. This seems regrettable, and in face of the introduction of the system of informal warnings or cautions, it is really quite unnecessary in order to preserve innocent persons from arrest.¹⁰⁹ In fact, the Act provides in section two a procedure whereby a person who has been cautioned by a police officer in respect of her conduct in a street or public place may apply to the magistrates' court within fourteen days for an order to have the record

¹⁰² *Id.* para. 250, at 85.

¹⁰³ *Id.* paras. 251-56, at 86-87, and recommendations (xix) and (xx), at 116.

¹⁰⁴ 7 & 8 Eliz. 2, c. 57, § 1(1): "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."

¹⁰⁵ CMND. No. 247, paras. 257-65.

¹⁰⁶ *Id.* para. 259, at 88.

¹⁰⁷ *Id.* paras. 260-62, at 88-89.

¹⁰⁸ H.C. DEB. (5th ser.) 1267 *et seq.* (1959) (House of Commons Second Reading); 216 H.L. DEB. (5th ser.) 72 *et seq.* (1959) (House of Lords Second Reading).

¹⁰⁹ See *infra* note 111 for a description of the "caution" system.

or entry of the caution at the police station expunged, these proceedings to be conducted in camera, unless the woman desires that they be conducted in public. The case for the retention of this derogatory label "common prostitute" has by now worn very thin.

The Wolfenden Committee's failure to deal with curb-crawling by motorists—that is, driving slowly along the streets in the hope of making a pick-up—has also been severely criticized, and it is rather a feeble excuse that the Committee advanced for making no recommendation. It would require the creation of a new offense, it said, and there would be difficulties in proving that a driver was dawdling for the purposes of immoral solicitation; and the possibility of a very damaging charge being leveled against an innocent person was again mentioned.¹¹⁰ But surely the warning system would also be capable of extension to such offenses. The fact is that quite a number of prostitutes and even more of their clients use motor-cars in the course of solicitation.

3. *The new law of prostitution*

The new law of prostitution follows closely the Committee's recommendations for the introduction of heavier penalties for solicitation, coupled with the extension to all areas of the system of cautions as practiced in Edinburgh and Glasgow.¹¹¹ In London, imprisonment was not normally available formerly and the maximum fine was forty shillings. Outside London, the maximum fine was similar, but the courts had power to order imprisonment for not more than fourteen days. In addition, some magistrates made use of their powers to bind over prostitutes to be of good behavior in sums of up to seventy-five pounds; and if the prostitute failed to comply with the order, she forfeited the recognizance, and if she failed to pay the sum of money estreated, she was imprisoned.¹¹²

The Committee proposed a new law that would be of general application, applying alike to London and the provinces, and to both urban and rural areas; and this is what has been enacted. The new penalties are a fine of up to ten pounds for a first offense, twenty-five pounds for a second or subsequent offense, and an alternative or additional penalty of a sentence of imprisonment for a third or subsequent offense, the period of imprisonment not to exceed three months.¹¹³ These are, it is stressed, the maximum penalties, and the courts are at liberty to impose some lesser penalty.

The Committee was well aware that the cost of the higher fines would be passed on to the consumer in the form of increased charges to the prostitute's client, and even that some prostitutes might be forced to become more active on the streets to

¹¹⁰ CMND. No. 247, para. 267, at 90.

¹¹¹ The Lord Chancellor described the system that the Commissioner of Police for the Metropolis is to adopt for giving two cautions before making an arrest in the Second Reading debate on the *Street Offences Bill*. See *supra* note 108, at 74, 75. The Home Secretary has commended the provincial police to follow the same procedure.

¹¹² See letter by Mr. Alec Grant, *The Observer*, Aug. 23, 1959.

¹¹³ *Street Offences Act*, 1959, 7 & 8 Eliz. 2, c. 57, § 1(2).

enable them to pay the increased fines.¹¹⁴ But the sanction of imprisonment, it was felt, would act as a deterrent to some degree, and more important, it would act as an incentive in the direction of reform. "We believe that the presence of imprisonment as a possible punishment may make the courts anxious to try, and the individual prostitutes more willing to accept, the use of probation in suitable cases." Since probation requires the consent of the probationer over fourteen years old, and the alternatives in the past were simply small fines, few prostitutes accepted probation even when it was offered to them. It is thought that under the new conditions, some even of the most persistent offenders might accept probation, and the Committee was particularly anxious to encourage the young prostitute to accept probation.¹¹⁵

In this connection, it was thought desirable to give the courts power to remand, in custody if need be, for not more than three weeks, any prostitute convicted for the first or second time of a street offense, in order that a social or medical report might be furnished. This power was thought necessary so that a young prostitute should be given every chance to benefit fully from the kind of help with personal problems that the probation service and the other social services connected with the courts are able to provide. The courts already have power to remand a convicted person, in custody if necessary, for up to three weeks, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, but it was thought by the Committee to be desirable to provide expressly for this in the case of prostitutes.¹¹⁶ The Street Offences Act, 1959, does not contain any provision implementing this recommendation.

The Committee rejected the idea of providing a special system of punishment for prostitutes, including a period of residence in a special establishment. They did not think it would be desirable, practicable, or equitable; and they gave two reasons for this view. First, it would be undesirable to segregate prostitutes in a residential establishment. Secondly, it would be inequitable, because it would involve a breach of the principle that the punishment must bear some relation to the gravity of the offense. Prostitution is not per se a criminal offense, and it is for the act of soliciting that the prostitute is punished. To submit her to a prolonged period of compulsory detention merely because she has committed such an offense would be wrong.¹¹⁷

The Committee, in discussing the possible consequences of its recommendations, reasserted that it was not its aim to make prostitution illegal or to abolish it, but simply to insure that the streets of London and the big provincial cities should be freed from what is offensive or injurious and made tolerable for the ordinary citizen.¹¹⁸ It was recognized that driving prostitution underground in the way proposed may have several serious consequences. It may encourage closer organization of the trade, the development of new classes of middlemen—e.g., taxi-drivers and hotel-porters who will supply addresses—and an extension of the "call-girl" system

¹¹⁴ CMND. No. 247, para. 276, at 93.

¹¹⁶ *Id.* para. 280, at 94.

¹¹⁸ *Id.* para. 285, at 95.

¹¹⁵ *Id.* paras. 277-78, at 93.

¹¹⁷ *Id.* paras. 282-83, at 94-95.

and perhaps the activities of touts. Another possible consequence is an increase in the number of small advertisements placed in shops and local newspapers, offering the services of "masseuses," "models," or "companions." One member of the Committee thought there should be some form of public control over such advertisements.¹¹⁹ The Committee admitted the danger, but thought that such developments would be less injurious than the presence of large numbers of prostitutes on the streets.¹²⁰

It must be recorded as a matter of personal impression that these developments foreseen by the Committee have already taken place or are taking place. There has been talk of the offer for sale on the streets of a "Lady's Directory," giving names and addresses. The small advertisements in the shops have multiplied. But at the same time, the amount of open solicitation in the streets has almost certainly declined. It seems to be generally agreed that the attempt to drive the women off the streets has been remarkably successful.

Some figures have just become available concerning the number of prosecutions under the Street Offences Act, 1959. In the Metropolitan Police Area of London, in the first three months of the Act's operation, the number of prosecutions for offenses against section one of the Act was 464; in the corresponding three-month period in 1958, the number of prosecutions for similar offenses was 4,318.¹²¹ In the first six months of the Act's operation, arrests and summonses for solicitation dropped by 90% in London and by roughly the same proportion in the provinces; and there was a corresponding decline in the number of men arrested for living on immoral earnings.^{121a}

The other figures relate to the number of women sentenced to terms of imprisonment. Between August 16, 1959, when the Act came into force, and October 21, 1959, the number of women sentenced to terms of imprisonment on conviction for offenses under the Act was thirty-three; in addition, fifty-three women served terms of imprisonment in default of payment of a fine.¹²² From these figures, it would appear that only a very small percentage of the women convicted have been imprisoned so far. It should be remarked that the figures for imprisonment relate to the whole country for two months, whereas the figures for prosecutions relate only to the Metropolitan Police Area, but they are for three months. This figure should be compared with the number of women imprisoned in the year 1958 for offenses of prostitution, which was 138.¹²³ It looks as if this number is going to be increased up to 500 receptions per annum, if the present rate of committals is sustained.

¹¹⁹ Mr. James Adair, O.B.E., in his reservations. *Id.* at 122.

¹²⁰ *Id.* paras. 289-90, at 96-97.

¹²¹ Earl Bathurst gave this reply to a question asked by Earl Winterton in the House of Lords, Nov. 25, 1959. 219 H.L. DEB. (5th ser.) 918 (1959).

^{121a} The Observer, April 3, 1960. See also the articles by Mrs. Rosalind Wilkinson in The Sunday Times (London), Dec. 6, 13, and 20, 1959.

¹²² Mr. Vosper gave this reply to a question asked by Mr. Fitch in the House of Commons, Nov. 5, 1959. 612 H.C. DEB. (5th ser.) 1194 (1959).

¹²³ CMND. No. 803, table 7, at 48-49.

4. *All-night cafes, living on immoral earnings, and the prostitute's client*

It is not proposed to discuss all the many detailed recommendations of the Wolfenden Committee dealing with the use of premises for the purpose of prostitution.¹²⁴ In any case, the new powers proposed for magistrates courts have not, so far, been implemented. But the Street Offences Act, 1959, did go further than the Committee was prepared to go in one direction, viz. in tightening up the law relating to all-night cafes (which the English law insists on calling "refreshment houses").¹²⁵ These are frequently used as places of resort by prostitutes. Another direction in which the Act makes the law more severe is with regard to the penalties for living on immoral earnings, where the maximum penalty was previously two years' imprisonment. The women members of the Wolfenden Committee wanted this increased to five years,¹²⁶ but the majority of the members of the Committee felt the two-year maximum was adequate for this offense.¹²⁷ The Street Offences Act, 1959, raises it to seven years, which seems unnecessarily severe.¹²⁸

Considerable interest attaches to the question whether it is possible to deal with the prostitute's client under the existing law, and whether there should be a new offense to deal with the customer. On the first question, there is a section dealing with a male person who persistently solicits or importunes in a public place for immoral purposes,¹²⁹ and in some places, the police have used this section to deal with males seeking prostitutes on foot and in motor-cars. But recently, a metropolitan magistrate refused to convict under this section, on the ground that this was not the type of conduct that the section was aimed at and that it was customary to associate with the section. The heavy penalties provided—two years' imprisonment is the maximum on conviction on indictment, as distinct from a summary conviction, where the maximum is six months' imprisonment—suggest that the offense is inappropriately invoked in the case of the prostitute's client. It belongs among the homosexual offenses. The Wolfenden Committee recognized that there was nothing in the words to prevent it applying to the solicitation of a female by a male,¹³⁰ but made no recommendation for any change of the law in the direction of the male customer. There are those who believe that the customer should be dealt with either under this section or by creating some new offense. There would be considerable difficulty in framing a new offense.¹³¹

¹²⁴ CMND. No. 247, ch. 11, at 101 *et seq.*

¹²⁵ 7 & 8 Eliz. 2, c. 57, § 3.

¹²⁶ See reservation by Mrs. Cohen, Mrs. Lovibond, and Lady Stopford. CMND. No. 247, at 128.

¹²⁷ *Id.* para. 307, at 101. See generally *id.* ch. 10, at 98 *et seq.*

¹²⁸ The Street Offences Bill § 4 proposed a penalty of 5 years, but this was altered by Parliament to 7 years.

¹²⁹ 4 & 5 Eliz. 2, c. 69, § 32.

¹³⁰ CMND. No. 247, para. 238, at 83.

¹³¹ See the Lord Chancellor's comment in the House of Lords debate on the Second Reading, *supra* note 108, at 76: "What is offensive is the public offer of the prostitute's wares," and the customer is not creating a nuisance. *Sed quare.*

5. *Licensed brothels*

The Committee very firmly rejected the notion of licensed brothels, which is hardly surprising considering the experience of other countries that have tried this system and the general policy of the nations of the world, which are now nearly all against such a system. All but two European countries have now abolished licensed brothels, and there are now, according to the Committee's Report, 119 "abolitionist" countries as against nineteen countries that still retain tolerated brothels. In the Committee's view, the toleration of brothels by the state would be a retrograde step.¹³²

6. *Research*

The strong support given by the Committee to the need for more research on the etiology of prostitution is very welcome.¹³³ Some interesting studies have recently been undertaken in the hope of providing fuller information not only about the prostitute, but also about her client, and some important papers have appeared since the publication of the Committee's Report.¹³⁴

III

HOMOSEXUAL OFFENSES

The other part of the Wolfenden Committee's terms of reference required it to examine the law and practice relating to homosexual offenses and the treatment of persons convicted of such offenses by the courts. Its principal recommendation, that in favor of legalizing homosexual acts between consenting adults in private, has attracted widespread attention and provoked considerable controversy in Britain; but because of this, perhaps, some of the other recommendations have tended to be overlooked and have been lost sight of. We shall not discuss the main recommendation in detail, but shall say something about the philosophical and moral debate that has arisen out of this recommendation; then, we shall go on to describe the less important recommendations that are worthy of comment.

1. *The main recommendation on consensual relations between adults in private, and the moral debate centered around it*

The overlapping province of law and morals is recognized by everyone in connection with the difficult problem of homosexual offenses, as with offenses connected with prostitution. The Wolfenden Committee saw the sphere of operation of the criminal law in regard to these problems in much the same way as the Street Offences Committee of 1928 perceived it. It believed it was not part of the business of the criminal law to interfere with the private lives of citizens, except in so far as

¹³² CMND. No. 247, paras. 291-96, at 97.

¹³³ *Id.* para. 297, at 98.

¹³⁴ Dr. Trevor Gibbens is conducting some research into the clients of prostitutes. Several articles on prostitution appeared in 9 *BRIT. J. DELINQ.* no. 3 (1959). See also Gibbens, *Juvenile Prostitution*, 8 *id.* at 3 (1957).

there was an overriding public interest that made it necessary to do so. In this field, the function of the criminal law is "to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others."¹³⁵ The Committee mentioned in particular those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, or economic dependence.¹³⁶ It did not regard it as the function of the criminal law to intervene in order to enforce any particular pattern of behavior further than is necessary to carry out these purposes; nor did it believe that the criminal law should try to cover all fields of sexual misbehavior. Indeed, the law does not seek to do so at the present time, for in Britain, adultery and fornication are not criminal offenses; neither is prostitution as distinct from solicitation.¹³⁷ The Committee's view was that while the province of sin and that of crime necessarily overlap, they need not coincide.¹³⁸

This analysis of the relations between law and morals, with particular reference to the proper scope and function of the criminal law, has provoked some criticism, but the approach is not novel. Sir James Fitzjames Stephen said much the same thing in the nineteenth century,¹³⁹ and so did the Street Offences Committee in 1928. The trouble has arisen from trying to apply the analysis to subjects where ignorance and prejudice frequently obscure reason, and where deep feelings are aroused on either side. The Committee admitted that opinion will differ concerning what is offensive, injurious, or inimical to the common good, and also as to what constitutes exploitation or corruption;¹⁴⁰ and Mr. Justice Devlin has observed that this is where its analysis breaks down.¹⁴¹ His own analysis is equally controversial, as we shall see; but let us first see how the Wolfenden Committee formed its estimate of what is offensive or injurious.

The Committee was guided, it tells us, by its estimate of the standards of the community in general, recognizing that not all citizens would agree with this estimate. It thought that the law should not fall too much out of line with public opinion, either by being too much in advance of it or by falling behind. But on this subject, it had not succeeded in discovering an unequivocal public opinion. The Committee was, therefore, forced back upon its own opinion of what was required in the way of the criminal law's intervention.¹⁴²

To this, there would appear to be two answers. The first is that on balance, opinion in Britain now seems to be definitely against the legalization of consensual relations between adult males conducted in private. A Gallup poll taken shortly after the publication of the Wolfenden Committee Report showed that in the public's estimation, the problem of homosexuality did not rank as high in order of importance

¹³⁵ CMND. No. 247, para. 13, at 9-10.

¹³⁶ *Id.* paras. 12-14, at 9-10.

¹³⁷ *Id.* para. 14, at 10.

¹³⁸ See generally, *id.*, paras. 48-61, at 20-24, esp. paras. 49, 52, 61.

¹³⁹ 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND ch. 17 (1883).

¹⁴⁰ CMND. No. 247, para. 15, at 10.

¹⁴¹ PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1950).

¹⁴² CMND. No. 247, paras. 15 and 16, at 10.

as the problem of prostitution, and that only thirty-eight per cent were in favor of private homosexual acts between consenting parties being legalized; forty-seven per cent thought these should still be punished; and fifteen per cent were uncertain.¹⁴³ In a poll of adult education classes conducted at Leeds, almost exactly opposite results were shown, but this is probably a reflection of the composition of the adult student group as compared with the public at large¹⁴⁴—it is obvious that such a group cannot be regarded as representative of the public as a whole. Nor can the Church Assembly, which voted by a narrow majority—155 to 138—in favor of abolition. The national press was quite evenly divided when the Committee's recommendations were published, and the Lord Chancellor gave the divided state of public opinion as the Government's reason for not implementing this part of the Committee's recommendations: the general sense of the community was against any such change.¹⁴⁵ But, of course, as Dicey has so shrewdly observed, circumstances may change, and a change of belief may well come about as a result—even on such a matter as this; for the changed circumstances may incline the majority to hear with favor theories that are not acceptable at the present day.¹⁴⁶

The second answer is that advanced by Mr. Justice Devlin in his lecture to the British Academy in March 1960, in which he accused the Committee of an error of reasoning. It had failed to distinguish between public and private morality: while being prepared to allow private homosexual behavior between consenting adults, it had condemned corruption of the young and living on immoral earnings of a homosexual prostitute; so, in fact, it had assumed and accepted the existence of a public morality by recognizing that in certain circumstances, society does pass a moral judgment and asserts moral standards even in regard to what takes place in private.¹⁴⁷ The learned judge argued that the Committee's approach breaks down because, in requiring special circumstances to be shown in order to justify the intervention of the criminal law, it has defined those special circumstances in terms wide enough to cover the behavior under discussion in this controversy.¹⁴⁸

Mr. Justice Devlin claimed that it is not possible to set theoretical limits to the power of the state to legislate against immorality and to define inflexibly areas of morality into which the law is in no circumstances allowed to enter.¹⁴⁹ In answer to the question, how are the moral judgments of society to be ascertained, the learned judge invoked the standard of the reasonable man, well known to lawyers, which he said is interpreted by the twelve men and women in the jury box in any particular

¹⁴³ Letter by Mr. Henry Durant, of Social Surveys (Gallup Poll) Ltd., to *The Times* (London), Sept. 18, 1958.

¹⁴⁴ See Jepson, *Homosexuality, Capital Punishment, and the Law: Two Questionnaires*, 9 *BRIT. J. DELINQ.* 246 (1959).

¹⁴⁵ House of Lords debate, Dec. 4, 1957, 206 *H.L. DEB.* (5th ser.) 733, 773 (1959).

¹⁴⁶ A. V. DICEY, *LECTURES ON THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY* 23 (2d ed. 1914).

¹⁴⁷ Devlin, *op. cit. supra* note 141, at 10.

¹⁴⁸ *Id.* at 13.

¹⁴⁹ *Id.* at 14.

instance.¹⁵⁰ He preferred to place reliance on what Pollock once called "the practical morality" of juries, which will give expression to the feelings of intolerance, indignation, and disgust that, the judge maintains, are the true forces behind the moral law.¹⁵¹

On this view, it would seem that the legislature should not change the criminal law where it touches upon morals until it has become unworkable by the refusal of juries to convict or has fallen into desuetude by the failure to bring prosecutions. It may well be that it is in this way that we shall be given the green light to go ahead and change the laws relating to homosexual offenses, for Mr. Justice Devlin himself admits that the limits of tolerance shift in the matter of morals.¹⁵² But it might not be necessary to wait so long if a clear lead were given by leaders of opinion in the country.

The learned judge's penetrating criticism of the Wolfenden Committee's "error of jurisprudence"¹⁵³ called forth a spirited reply from the Professor of Jurisprudence of the University of Oxford, Professor H. L. A. Hart.¹⁵⁴ He argued that before turning general moral feeling into criminal legislation, the legislator should pause to consider whether it is not based upon ignorance, misunderstanding, and superstition about the matter, however much indignation and disgust is felt about it. He should consider whether there is a false assumption about the dangers to society that the conduct involves and whether other equally relevant factors have not been overlooked. He stressed a need for a critical scrutiny of our laws that in the judge's view seemed hardly necessary or appropriate. One might simply add that when the Times leader, which received the judge's lecture favorably, remarked that there was a moving and welcome humility in the conception that society should not be asked to give its reasons for refusing to tolerate what, in its heart, it feels intolerable,¹⁵⁵ this comment drew the retort from a correspondent that he feared we were less humble than we used to be: time was when we burned old women because, without giving reasons, we felt in our hearts that witchcraft was intolerable.¹⁵⁶ In other words, this argument based on public morality, like arguments based on the rule of law, involves riding rather an unruly horse.

It will be seen that this debate concerning the main recommendation of the Wolfenden Committee relating to homosexual offenses has been conducted on a somewhat lofty plane—on a rather philosophical level—at least in academic circles, and more practical questions concerning the dangers of blackmail and the effectiveness of criminal prohibitions that the police can only enforce in a small minority of the cases that actually occur have been neglected. Again, the question how far the consent of the other party should be capable of modifying the legal responsibility for

¹⁵⁰ *Id.* at 16.

¹⁵¹ *Id.* at 17.

¹⁵² *Id.* at 18.

¹⁵³ *Id.* at 23.

¹⁵⁴ Hart, *Immorality and Treason*, 62 LISTENER 162 (1959).

¹⁵⁵ The Times (London), March 19, 1959.

¹⁵⁶ Letter from Rev. H. A. Williams, *id.* March 24, 1959. See also letters from Sir Henry Slesser, *ibid.*; Mr. P. J. Noble, *id.* March 25, 1959.

a person's behavior towards him is another aspect of the matter that has scarcely been explored, though it is true that Mr. Justice Devlin touched upon it,¹⁵⁷ and it has been discussed by Lord Denning, both in the House of Lords and elsewhere.¹⁵⁸

2. *The other findings and recommendations*

Turning briefly to the other findings and recommendations concerning homosexual offenses, on the medical side, it should be noted that the Committee's analysis of the homosexual condition¹⁵⁹ and the treatment prospects,¹⁶⁰ while it is sober and realistic and accepts the need for more research and rejects the notion of disease, has been severely castigated by Dr. Peter Scott for its clinical inadequacy,¹⁶¹ and by Drs. Curran and Whitby, themselves members of the Committee, for oversimplifying the clinical picture.¹⁶²

The principal minor recommendations concern the reclassification of the homosexual offenses, the reform of penalties, and the procedure for instituting proceedings, etc. It is recommended that buggery be reclassified as a misdemeanor instead of a felony¹⁶³ and that the maximum penalties available be revised.¹⁶⁴ The main revision is with regard to consensual acts between an adult person and a person over sixteen and under twenty-one years of age, where it is proposed that the penalty be revised upwards from two to five years' imprisonment; but some members of the Committee favored a more drastic downwards revision, including abolition of the distinction between buggery and other homosexual offenses where there is no consent.¹⁶⁵ The most extreme liberal view is represented by Dr. Curran, who would make the maximum penalty for indecent assault the same as for gross indecency (two years),¹⁶⁶ which is going further than Dr. Whitby was prepared to go.¹⁶⁷ There seems to be a good case for looking again at the question of maximum penalties for homosexual offenses, now that it seems unlikely that Parliament will proceed immediately to alter the legal definitions of the offenses.

There is also a case for implementing recommendation four, to the effect that no proceedings be taken in respect of a homosexual act (other than indecent assault) committed in private by a person under twenty-one years of age without the sanction of the Attorney General, unless taken by the Director of Public Prosecutions.¹⁶⁸ Indeed, it is not clear why the same consent should not be required before pro-

¹⁵⁷ DEVLIN, *op. cit. supra* note 141, at 8.

¹⁵⁸ House of Lords debate, note 145 *supra*, at 806 *et seq.*; *Bravery v. Bravery*, [1954] 1 Weekly L. R. 1169, 1180 (C.A.). See also Hall Williams, *The Wolfenden Report—An Appraisal*, 29 POL. Q. 132, 136-37 (1958).

¹⁵⁹ CMND. No. 247, paras. 17-36, at 11-17.

¹⁶⁰ *Id.* paras. 191-212, at 66-72.

¹⁶¹ Scott, *Psychiatric Aspects of the Wolfenden Report*, 9 BRIT. J. DELINQ. 20 (1958).

¹⁶² In a note appended to the treatment section of the Report. CMND. No. 247, at 72-76.

¹⁶³ *Id.* para. 94, at 36, and recommendation (viii), at 115.

¹⁶⁴ *Id.* paras. 90-91, at 34-35, and recommendation (vii), at 115.

¹⁶⁵ See the reservation by Drs. Whitby and Curran, Lady Stopford, and Mrs. Cohen. *Id.* at 123-24.

¹⁶⁶ Further reservation by Dr. Curran. *Id.* at 126-28.

¹⁶⁷ Further reservation by Dr. Whitby. *Id.* at 125-26.

¹⁶⁸ *Id.* para. 72, at 27-28, and recommendation (iv), at 115.

ceedings against consenting adults are launched. The Committee also recommended that homosexual offenses revealed incidentally in the course of investigating allegations of blackmail should not normally be made the subject of criminal proceedings.¹⁶⁹

3. *Medical reports and imprisonment*

On the subject of medical reports, the Committee considered the argument in favor of every person found guilty of a homosexual offense being remanded for a medical report prior to sentence, and rejected it on the following grounds:

- a. It did not seem right to single out homosexual offenders from the general body of sexual offenders: if homosexual offenders were to be examined, why not others?
- b. The court's responsibility for sentence should not be undermined. Courts already have power to remand for medical reports and frequently exercise that power (but, according to the Cambridge Report, not frequently enough).
- c. The availability of sufficient experts is doubted.¹⁷⁰

Even the more limited suggestion that before sending a person found guilty of a homosexual offense to prison for the first time, the courts should be required to obtain a medical report, was not accepted.¹⁷¹ Instead, the Committee was content to recommend that the courts be required to obtain a medical report in respect of every person under twenty-one years of age convicted for the first time of a homosexual offense.¹⁷² So far, nothing has been done to implement this recommendation.

It still seems likely, therefore, that the majority of serious homosexual offenders will be sent to prison for fairly long terms, while large numbers of the offenders guilty of the less serious offenses will simply be fined. The Committee suggested that there is room for the more extensive use of probation, coupled with a condition for medical treatment.¹⁷³ Within the prisons, considerable efforts are being made in the treatment of psychologically disturbed offenders, especially by group methods, but there is considerable room for improvement: very little is done for the homosexual offender.

Estrogen treatment is forbidden in the prisons of England and Wales, but not, it seems, in Scotland; and the Committee recommended that it be made available.¹⁷⁴ Castration was discussed very briefly (seven and one-half lines), and dismissed on the ground that there is no guarantee that this operation removes either the desires or the ability to fulfil them.¹⁷⁵ Recently a man who had been convicted of a serious sexual attack and sentenced to four years' imprisonment appealed to the Court of

¹⁶⁹ *Id.* para. 112, at 40-41, and recommendation (ix), at 115.

¹⁷⁰ *Id.* paras. 181-85, at 62-64.

¹⁷¹ *Id.* para. 186, at 64-65.

¹⁷² *Id.* para. 187, at 65, and recommendation (xvi), at 116.

¹⁷³ *Id.* paras. 198-200, at 68-69.

¹⁷⁴ *Id.* paras. 209-11, at 71-72, and recommendation (xvii), at 116.

¹⁷⁵ *Id.* para. 212, at 72.

Criminal Appeal against his sentence, and the question of castration was raised in a novel form: Would the Court give its blessing to such an operation being carried out in prison? The Court held that it was not part of its function to give any such direction. The prisoner offered to undergo hormone treatment on release, if put on probation; but the Court held that it was impossible to supervise such a condition of probation, and the appeal was dismissed.¹⁷⁶

4. *The Statistical picture*

The statistical picture presented in the Wolfenden Committee Report shows that the number of homosexual offenses known to the police has increased considerably in recent years; but, as in the case of prostitution, it is difficult to say how far these figures are conditioned by the efficiency and intensity of police activity.¹⁷⁷ The Committee cautiously concluded that whatever the truth about the increase in the number of offenses, the fact is that homosexual behavior is practiced by a small minority of the population, and the position should be seen in its proper perspective.¹⁷⁸ The following is an extract of the figures in table one of appendix two of the Report:¹⁷⁹

Number of Homosexual Offenses Known to the Police (England and Wales)

Year	Buggery	Indecent assault etc.	Gross indecency	Total
1938	134	822	320	1276
1946	247	1523	561	2331
1952	670	3087	1686	5443
1955	766	3556	2322	6644

The figures for 1958, which can be compared, are as follows:¹⁸⁰

1958	625	2969	1877	5471
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It will be observed that in the first full year since the publication of the Wolfenden Committee Report for which figures are available, there has been a decline in the number of offenses known to the police. There has been a corresponding decline in the number of prosecutions and convictions. It will be interesting to see whether this continues.

CONCLUSION

We have described the British experience in dealing with sexual offenders generally—including sexual offenses against young persons, about which there has been special concern—offenses connected with prostitution, and homosexual offenses. There has been constant concern about these matters in Britain, and many problems

¹⁷⁶ *Regina v. Cowburn*, Court of Criminal Appeal, May 11, 1959, reported in *The Times* (London), May 12, 1959; [1959] CRIM. L. REV. 590; see also Havard, *R. v. Cowburn*, *id.* at 554. See also *Castration for Sexual Offenders: A Commentary on a Recent Case*, 27 MEDICO-LEGAL J. 136 (1959); Binney, *Legal Aspects of Sterilisation*, 25 MEDICO-LEGAL J. 111 (1957).

¹⁷⁷ CMND. No. 247, para. 43, at 19.

¹⁷⁹ *Id.* at 130.

¹⁷⁸ *Id.* para. 47, at 20.

¹⁸⁰ CMND. No. 803, table A, at 2.

have been raised with regard to each group of offenders. For example, the question of compulsory medical examinations, detention of persistent offenders in special institutions, the length of imprisonment, the use of probation and fines, and the question how far the law should interfere with the private lives of citizens in this area of sexual conduct. Although we have flirted with the idea of special institutions, no sexual offender laws have been passed in Britain similar to those existing in some jurisdictions, but the recent Mental Health Act, 1959, may be invoked with regard to some sexual offenders. No dramatic remedies appear likely to be adopted, but we shall look to the patient evolution of our institutions and laws from generation to generation, profiting all the time from the experience of our predecessors, and maybe learning some things from our own experience and that of other countries.

SEX OFFENSES: THE SCANDINAVIAN EXPERIENCE

GEORG K. STÜRUP*

INTRODUCTION

Despite the broad assumption that there is a special emancipation in sexual matters in Scandinavia, there is still in many circles a tendency to deprecate sex problems and generally to de-emphasize the importance of sex in life. Nevertheless, it is clear that great changes have occurred in the thinking of large segments of the population during the last generation—changes conducing a more realistic evaluation of sex and its role in daily living. This does not mean that actual sexual behavior has become significantly more promiscuous—for, indeed, there is no proof at all of this. It rather means that concealment and the so-called double standard are no longer generally sanctioned; and those who still adhere to these norms no longer assert them quite as dogmatically, but appear to recognize the possibility that their point of view may not be infallible or at least exclusively valid. There still exists, however, a widespread anxiety concerning the results of child-seduction and the more obvious manifestations of childhood sexuality, which is reflected in strong reactions to sexual assault on children.

In explaining the approach to sex criminality in Scandinavia to a foreign audience, it is perhaps necessary to point out that Scandinavia is not a political entity, but several independent countries. Difficult as it is to discuss the more significant aspects of a subject such as this with respect to one's own country, it is even more difficult to discuss them with respect to a foreign country, even where one feels a general familiarity with the matter. Accordingly, the primary focus of this article will be Denmark. A few general words will, however, be said about attitudes towards sex problems in Scandinavia—and especially about the elements that are contributing to their rapidly-changing complexion. In this connection, the writer will disregard the considerable modifications in social structure that are occurring in different societies all over Europe—e.g., increasing urbanization—and will advert only to the more distinctive developments in Denmark and, to a lesser extent, in Norway and Sweden.

I

THE CONTEMPORARY SCENE

A. Sex Education

In the last generation, sex education has been taught not only in the few private schools that exist in Denmark, but also in many public schools and training colleges as well, often—especially in those schools that are regarded as the pacesetters—in quite a complete and realistic way.

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For the general public, too, there have become available, apart from enormous tomes that are much too expensive for the ordinary man and contain far too much about sexual abnormalities and illnesses, a large number of inexpensive, sober, and instructive smaller books.¹ These are not only widely sold in bookshops, but are also found in the numerous public libraries spread all over the country. They contain in addition to a simple and sensible explanation of the anatomy of the sexual organs and their physiology—a subject that is omitted, partially or completely, in the older schoolbooks and many of the new ones—an explanation as well of intercourse, fertilization, and the unfortunately still not quite foolproof means of contraception.

These books generally emphasize the following main points:

The sexual urge is a huge power of nature that is initiated and sustained by a chemical mechanism; it is a hormonal function. In the lower animals, propagation is assured through this complex mechanism, which works like a chemical switch: first, hormone production; then, attraction of a partner in a corresponding phase; and then, conception. The higher animals have more highly-developed nervous systems, and because of this, the feelings and associations that characterize the sex life of man arise. The sexual urge becomes, owing to its meaning for propagation as well as these psychic elements, an important factor in the life of the community, and sex life becomes governed by fixed cultural rules. These rules decide which sexual stimuli are culturally acceptable and contribute beneficially to daily interpersonal relations.

One should have no illusions, however, as to the constructive results of an education of this kind. There is still, in general, an astonishing lack of knowledge concerning sex, and few yet talk freely about it. Not until there is produced a generation of parents so free from fear of sex that they can raise their children without transmitting this fear to them will the lingering hypocrisy and evasiveness significantly decrease.

Some of these books that try to develop a healthy attitude towards sex also briefly mention the most important sexual abnormalities. Homosexuality, which is caused by an interplay between natural capacities and environment, is thus referred to as a stressful deviation for the person concerned that in itself does not entail any social risk. There is no responsible person in Scandinavia who would advocate a law imposing sanctions on homosexual activities between adults. The relatively harmless forms of exhibitionism are also mentioned, and the character of the masochistic-sadistic mechanism is suggested. For those who see human behavior in terms of stimulus-response, it is pointed out as well that from a purely biological point of view, there are times when the sexual urge is especially pronounced, when a very slight stimulus can trigger a disproportionate response and easily cause behavior that

¹ E.g., ØRNULF ØDEGAARD, *SAMLIVETS NATURLAERE* [NATURAL SEX LIFE] (1942) (first published in Norway); JOHN TAKMAN, *UNGDOMMENS SEKSUELLE PROBLEMER* [SEXUAL PROBLEMS OF YOUTH] (1949) (first published in Sweden); HENRIK HOFFMEYER, *SEKSUALOPLYSRING FOR UNGE* [SEXUAL INFORMATION FOR YOUNG PEOPLE] (1948). For the very young, see, e.g., STEN HEGLER, *HVORDAN, MOR?* [HOW, MOTHER?] (1949).

shortly thereafter will seem quite unreasonable to everyone—including the actor.

Twelve years ago, for the first time, the facilities of the Danish radio were made available for the wider dissemination of sex information and the encouragement of discussion of sex problems. Seven programs were broadcast—all quite frank and all at the best listening time in the evening. The series was concluded with two round table discussions about sex education in schools and about sex life in society.²

B. Current Sex Problems

Two sex problems that are currently exciting much interest and discussion are the legalization of certain abortions, and the prevalence of premarital sexual relations.

1. *Legal abortions*

In the years following World War I, there arose in Denmark a wave of public feeling against the rather strict penalties that might be imposed for the offense of induced abortion. At that time, there was a rule of *jus necessitatis*, according to which abortion might be induced only where necessary to save a woman's life. This rule soon came to be interpreted differently, however, and convictions grew difficult to come by, especially at the hands of a jury. The reduction of penalties for the offense that had been effected in 1930³ was not enough to arrest this trend, and in 1932, a commission was appointed to frame what was to become the pregnancy law of 1937.⁴

Under this law, a mothers' aid institution that previously had been organized and operated by a private association was legalized. Since then, it has developed very rapidly, as has a similar institution in Sweden. Although its clientele initially was mostly unwed women applying for abortions, three-fourths of those now seeking its assistance are married. In sixty per cent of these latter cases, no basis for abortion is found; and of these, seventy to eighty per cent carry their babies to term.⁵

The law has recently been formally changed,⁶ but the substance remains the same. Abortion can only be obtained when:

- a. It is necessary to avert serious danger or loss of the woman's life. This judgment is based on all relevant facts, including the circumstances under which the woman has to live. Consideration is accorded not only physical or psychic illnesses, but also present or threatening weakness of a physical or psychic nature. The decision is made by a special committee consisting of the

² These have been published as GEORG K. STÜRUP (ED.), 5 LÆGER OM ÆGTESKABETS PROBLEMER [5 DOCTORS ON PROBLEMS OF MARRIAGE] (1947).

³ Law No. 126 of April 15, 1930, [1930] Lovtidende § A, at 697 (Den.); cf. Law No. 127 of April 15, 1930, [1930] Lovtidende § A, at 754 (Den.)

⁴ Law No. 163 of March 18, 1937, [1937] Lovtidende § A, at 887 (Den.); cf. Law No. 119 of March 15, 1939, [1939] Lovtidende § A, at 349 (Den.)

⁵ For more extended discussion, see Skalts, *Svangerskabet og Mødrehjælpsloven* [Pregnancy Law and Mothers' Aid Law], 33 SOCIALT TIDSKRIFT 1 (1957); cf. MARTIN EKBLAD, INDUCED ABORTION ON PSYCHIATRIC GROUNDS: A FOLLOW-UP STUDY OF 479 WOMEN, ACTA PSYCHIAT. ET NEUROL. (Supp. No. 99, 1955).

⁶ Law No. 177 of June 23, 1956, [1956] Lovtidende § A, at 405 (Den.).

head of the mothers' aid institution (often a social worker), a psychiatrist, and a surgeon (gynecologist).

- b. The pregnancy has resulted from a criminal act—e.g., incest, rape, or intercourse with a child under fifteen years of age.
- c. There is serious risk of abnormal offspring—e.g., an hereditary indication.
- d. Serious psychic or physical defects or other medical indications render the woman unfit to care for the child—e.g., if the woman is a mental defective.

Abortion has never been an ideal solution, and more satisfactory alternatives are still being sought. In this connection, the mothers' aid institution has started an information service and has developed other forms of aid for pregnant women. For example, it fights the prejudice against illegitimate children; it has secured for unwed mothers the right, if they wish, to be called "Mrs." in public offices; and it has established family-oriented out-patient facilities, where social and medical advice, including instruction in the effective use of contraceptive techniques, and some psychiatric group-counseling are made available.

Legal abortions in Denmark number about 5,000 a year; the number of illegal abortions, of course, is unknown. Sterilization is employed in a limited number of cases where indicated for medical as well as social reasons. It is astonishing how much more effectively a poor overworked mother can cope with her problems when she is no longer plagued by a fear of further pregnancies. Medical education now adverts systematically to these matters, although sexology, social psychiatry, and forensic psychiatry are not yet independent subjects at the universities.

2. Premarital sexual relations

Some idea of the prevalence of premarital sexual relations may be gained by studying the number of illegitimate births.⁷ These figures are, of course, affected by the use of contraceptive techniques. From 1840-49, the 11.9 per cent rate was very stable; from 1901-05, the rate was 10.2 per cent; and from 1931-35, the rate was 10 per cent. Since then, the rates have steadily decreased, except for a slight aberration in the closing war years—8.9 per cent in 1943, and 9.2 per cent in 1944. In 1955-57, the rates have been 6.6, 6.8, and 6.9 per cent, respectively. The same general tendency has been observed in Sweden, although the corresponding rates have been somewhat higher.

Significant also is the number of children born during the first nine months of marriage. These are the Danish figures:

	1938	1957
Before one month	2.4%	1.2%
One to two months	3.0%	2.3%
Two to six months	20.7%	29.3%
Six to nine months	7.8%	12.5%
Total	33.9%	45.3%

⁷ The following figures are based on official statistics supplied by Carry Hedemann.

This means that in the same period during which the number of illegitimate births has been decreasing to 2,000 to 3,000 per year, there has been an increase in the number of births during the early months of marriage.

Although these figures give only an incomplete picture, Danish and Swedish investigations have revealed sexual habits and practices that closely parallel those discovered by Dr. Kinsey and his associates in the United States.⁸

The most important Danish investigation was made in the years 1944-47, using a relatively meager sample consisting of 132 unwed, 153 married, and 30 separated or divorced women, ranging from twenty to thirty-five, and averaging twenty-six years of age.⁹ These women were patients with epidemic illnesses, chosen at random and questioned upon leaving the hospital, and who, therefore, had not possibly heard of the investigation beforehand. Of the 315 women questioned, about one-half had received their sex education from friends, twelve per cent had received it from their mothers, three per cent had received it from their schools, and one-third of them had received none at all. Of the thirty-one of these women who had not had heterosexual relations (one of whom had had homosexual relations), eighteen were under twenty-three and three were over twenty-five years of age. Of the 284 sexually-experienced women, 1.4 per cent were married when they first had sexual intercourse, 21.4 per cent were engaged, 44.2 per cent had it with a boy whom they knew well, and the remaining 1.8 per cent had it with a casual acquaintance. The average age of these women at first sexual intercourse was 19.1 years, and the length of the acquaintance with her partner on the occasion averaged ten months. Therefore, one cannot say that rashness and promiscuity were characteristic.

In Sweden, many soldiers were interviewed in the years 1942-43,¹⁰ and the results were similar. Here, there was an opportunity to talk to forty-year-olds who had enrolled in the defense guards as well as twenty-year-olds. Ninety-seven per cent of the older men had had sexual relations before marriage, but only eighty per cent of the younger ones had. It is not certain that this difference is significant. The investigation indicated that the sexual relations of the older generation may have been of a more unstable character than those of the younger group. There was no sign of increasing laxity; indeed, if any change could be noticed at all, it was in the direction of recognizing that normal sexual relations demand a partner chosen not only on the basis of sexual factors, but others as well—e.g., the wish to satisfy the need in the partner, or a need of affection, or a wish to protect.

⁸ ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

⁹ KIRSTEN AUKEN, *UNGE KVINDERS SEXUELLE ADFAERD* [SEXUAL BEHAVIOR OF YOUNG WOMEN] (1955).

¹⁰ GUSTAV JOHNNSON, *SEXUALVANOR KAS SVENSK UNGDOM* [SEXUAL BEHAVIOR AMONG SWEDISH YOUTH] (Comm. for Youth Problems Rep. No. 41, 1951).

II

PUNISHABLE SEX OFFENSES

Among the Scandinavian countries, there has been a close collaboration in the field of administration of justice, which has given rise to similar views on what constitute punishable sex offenses. There are slight differences in the laws of each, but it is difficult to say how significant these differences are in daily life. A comparative analysis of many cases from the several countries would be necessary for an evaluation of this sort. It is probably safe, however, to hazard the generalization that sex criminality is punished similarly throughout Scandinavia.

The Scandinavian penal codes try especially to protect women's sexual freedom and to protect children.

The opening section on sexual offenses in the Danish Criminal Code provides:¹¹

Any person who enforces sexual intercourse with a woman by violence, by depriving her of liberty or by inspiring her with fear concerning the life, health, or welfare of herself or of her nearest relatives shall be guilty of rape

The minimum and maximum penalties are not less than one year and not more than sixteen years, respectively. Under particularly aggravating circumstances, a life sentence may be imposed, which makes rape one of the most severely punished crimes. Norwegian and Swedish law define and punish rape in much the same way.¹²

Few persons are convicted of and sentenced for rape. In the years 1929-39, of the 3,185 sexual offenses successfully prosecuted in Denmark, only ninety-four were for rape—about ten a year; and despite the increase in population, only twenty-three cases of rape were reported in 1953.¹³ Norwegian and Swedish experience has been similar.¹⁴

Sexual offenses against mentally defective or insane persons, by means of abuse of superior position or trickery, are treated more mildly than rape under the Danish Criminal Code.¹⁵ The Code also is concerned with sexual intercourse and sexual relations other than intercourse with a child under fifteen years of age (in Norway, the critical age is fourteen; in Sweden, it is fifteen); and if the child is under twelve years of age, the offense is considered an aggravated one.¹⁶ The abuse of superior age or experience to induce any person under eighteen years of age to engage in sexual intercourse is a punishable offense, too.¹⁷

¹¹ DANISH CRIMINAL CODE § 216 (Knud Waaben transl. 1958).

¹² For a more detailed description of the legislation and penological practice governing sex offenses, in Sweden, Norway, Denmark, and Belgium, see CAMBRIDGE DEPT OF CRIMINAL SCIENCE, *SEXUAL OFFENSES* pt. 6 (1957) [hereinafter cited as the CAMBRIDGE REPORT].

¹³ LOUIS LE MAIRE, *LEGAL KASTRATION I STRAFFETLIG BELYSNING* [LEGAL CASTRATION FROM A PENAL LAW PERSPECTIVE] table 2, at 87 (1946); le Maire, *Danish Experience Regarding the Castration of Sexual Offenders*, 47 J. CRIM. L., C. & P. S. 294 (1956).

¹⁴ Even in England, where the law is different, the incidence of rape is modest. In the years 1947-54, there has been a slight increase, but it is less than that for other forms of crime. See CAMBRIDGE REPORT table 1, at 12.

¹⁵ DANISH CRIMINAL CODE § 217 (Knud Waaben transl. 1958).

¹⁶ *Id.* § 222.

¹⁷ *Id.* § 223.

Homosexual relations are punishable only when one of the parties is under eighteen years of age.¹⁸ Punishment may be dispensed with, however, if both parties are of the same age. The abuse of superior age or experience to induce a person of the same sex and under twenty-one years of age to engage in sexually immoral behavior is a punishable offense as well.¹⁹

The law also proscribes several so-called indecent acts and punishes the person "who by obscene behavior violates public decency."²⁰ And a person who incites or invites another to prostitution or exhibits immoral habits in such a manner as to violate public decency or to give public offense or to inconvenience neighbors may also be prosecuted.²¹

In the sections concerning offenses against family relations, the law deals with incest, which is defined as sexual intercourse with any relative in lineal descent or ascent, or with brother or sister.²² The lineal descendant under eighteen years of age, however, will not be punished.

Table one indicates the frequency of convictions for these crimes. The seemingly great increase in criminal homosexuality in Copenhagen is probably attributable to a very thorough police work spurred by a few cases that were very much discussed in the newspapers.

TABLE I
CONVICTIONS OF SEX OFFENSES BY OFFENSE AND PLACE OF CONVICTION
(PER 100,000 MALE POPULATION OVER FOURTEEN YEARS OF AGE)

	CAPITAL		PROVINCIAL TOWNS		RURAL DISTRICTS	
	1938	1955	1938	1955	1938	1955
Rape	4	5	2	10	15	20
Sexual crime by abuse of dependence	1	8	1	3	4	8
Defilement of a minor	23	32	28	49	86	69
Seduction of a person under eighteen years of age	0	—	1	—	5	7
Criminal homosexuality	29	112	21	41	18	21
Indecency	44	123	47	67	68	61
Incest	5	3	9	16	21	14
Other sexual offenses	7	3	2	—	3	—
Total	113	286	111	186	220	200

SOURCE: Unpublished research of Karl O. Christiansen, Louis le Maire, and Georg K. Stürup.

Prostitution is not treated as a criminal offense. Police regulation of prostitution was abolished in Denmark in 1906, and since then, the police have sought to control it by invoking the Vagrancy Act.²³ This act gives the police a right to interrogate a person who has no visible means of support. The person may be enjoined to find legitimate employment, and if this injunction is violated, a sentence may be meted out.

¹⁸ *Id.* § 225.

²⁰ *Id.* § 232.

²² *Id.* § 210.

²³ Law No. 81 of March 30, 1906, DANISH CRIMINAL CODE § 199 (Knud Waaben trans. 1958).

¹⁹ *Ibid.*

²¹ *Id.* §§ 228-30.

Sexual relations with animals and adultery are still punishable in Norway, but not in Denmark or Sweden. Prosecutions for these offenses are very rare in Norway, however.

III

SEX OFFENSE STATISTICS

It is tempting to try, on the basis of published statistics, to compare the frequency of sex offenses in different countries; but a comparison of this sort would be misleading. Neither the number of reported criminal acts nor sentencing data impart information that can be directly compared. First, it is necessary to remember that a great many offenses of this sort are never reported—for a variety of reasons: The victim may feel ashamed or perhaps think that he or she had provoked the offense and, accordingly, be unwilling to talk about it. Or if it concerns children, parents may be unwilling to pursue the matter and further exacerbate the trauma; and in many cases, the children themselves may never even mention the matter at home. On the other hand, if a serious sex crime has been widely publicized in the newspapers, the number of reports concerning all other sexual offenses invariably increases.

The percentage of cases cleared is another relevant factor that should be considered. This percentage is greater for reported sex offenses than for other crimes, but it differs in different societies. In Denmark, about one-half of the cases reported in the capital and a somewhat larger percentage in the rest of the country are cleared. About two-thirds of the 2,009 cases reported in 1953 were cleared. A great many of these cases, however, did not result in conviction. For persons under eighteen, the charge will be withdrawn when guilt is proved, and the defendant will then be handed over to the child-welfare authorities for disposition. The charge will be withdrawn in other cases as well. Thus, of the 7,274 men convicted of all crimes in 1953, only 620 were convicted of sex offenses. Moreover, very few women are convicted of sex offenses. Thus, of the 757 women convicted of all crimes in 1953, only eleven were convicted of sex offenses, five of them being incest.²⁴

If the police are interested in a particular sex offense, there is often an increase in the number of reported cases of this sort. A careful study of sex criminality in general, with special attention paid to the frequency of relapse, however, has shown no important changes in Denmark from 1938-55. Of the 3,185 persons convicted of sex offenses during the period 1929-39, 32.6 per cent had past convictions, but only one half of these were for sex offenses. The majority of the group were under thirty-six years of age—and in this connection, it must be remembered that the minimum age for criminal conviction is fifteen and that very few persons in the fifteen-to-eighteen age group are convicted; therefore, the majority ranged from eighteen to thirty-six.²⁵

²⁴ CRIMINAL STATISTICS 1953 (1955).

²⁵ LOUIS LE MAIRE, *LEGAL KASTRATION I STAFFETLIG BELYSNING* [LEGAL CASTRATION FROM A PENAL LAW PERSPECTIVE] 107-13 (1946).

A follow-up study of this group has been conducted. The sample had, for several reasons, diminished to 2,942. In the course of years until 1953, only twenty-five per cent had relapsed, and of these, three per cent had been punished with only fines or light imprisonment. This study also showed that those who had been convicted previously suffered twice as many relapses (38.6 per cent) as those who had not (18.8 per cent). Table two demonstrates that this principle operated uniformly with respect to all the different types of sex offenses. As is seen in table three, the rate of relapse into sex offenses is smallest in the group of offenders who were convicted for the first time (6.9 per cent). Those who had several prior convictions (for sex and other offenses) had a rate of relapse into sex offenses more than three times as great.

The risk of relapse into sex offenses also appears to increase with age. Thus, among the younger offenders, there is probably a group whose criminality must be supposed to be related in some degree to difficulties in adaptation and to other milieu factors that are eventually resolved. The offenses of the other group appears, to a higher degree, to be dependent on more fixed patterns of behavior. Some of these latter offenders could perhaps be called perverted; but it is important not to misuse this term—one must confine it to cases where a special act is needed for sexual satisfaction. The act itself, however, should not be described as a perversion, since it must be seen in relation to what it means to the person to be so characterized.

IV

TREATMENT OF SEX OFFENDERS

The same treatment, more or less, is accorded different prisoners in the same prison, regardless of the offense for which convicted. Scandinavian prisons are rather small by international standards, containing from less than 100 to 350 prisoners. But in Scandinavian prisons, a humanistic approach is adopted, with individual medical, social, and psychological assistance being extended to each inmate. Corresponding supervision is exercised over those whose sentences have been suspended (on probation) and those who have been paroled. The criminological result is, as noted above, better for sex offenders than for others—at least, relapses appear to be less frequent.

From the foregoing, it is clear that scientifically to ascribe any particular result to any one or the other special treatment of first-time sex offenders is very difficult. On the other hand, it is likewise clear that mere conviction of a sex offense is a severe psychic trauma in itself, owing not only to the realization that relatives and friends must know of it, but also to the typically weak and often immature personality structures of sex offenders, which renders the blow to self-esteem especially hard. It is also demonstrable that sex offenders characteristically are individuals whose needs are so sudden and violent as to demand immediate satisfaction. But a large—maybe the largest—number of sex offenses are more circumstantial in nature than manifesta-

TABLE II
FORM OF CRIMINALITY (1929-39) AND RELAPSES (AS OF 1953)

	FIRST OFFENDERS			CRIMINALS WITH PREVIOUS RECORDS		
	Total	Relapses		Total	Relapses	
		Total	Percentage		Total	Percentage
Rape	55	7	12.7	34	18	52.9
Indecency to women	222	51	23.0	78	36	46.2
Intercourse with female under twelve years old	37	5	13.5	14	6	42.2
Intercourse with female over twelve years old	385	68	17.7	71	31	43.7
Indecency to girls	518	103	19.9	193	76	39.4
Indecency to boys	266	58	21.8	135	45	33.3
Exhibitionism	268	57	21.3	194	86	44.3
Father incest	118	11	9.3	55	9	16.4
Relations with stepchildren	93	16	17.2	48	13	27.1
Sibling incest	71	12	16.9	9	3	33.3
Others	61	5	8.2	17	4	23.5
Total of group sentenced in 1929-39	2,094	393	18.8	848	327	38.6

SOURCE: Unpublished research of Karl O. Christiansen, Louis le Maire, and Georg K. Stürup.

TABLE III
RATE OF RECIDIVISM (PERCENTAGE)

Earlier Offenses	LATER HISTORY					
	1 No offenses	2 Only sex offenses	3 Sex and other offenses	4 Only other offenses	2+3+4 total	1+2+3+4 total
a. First offenders	81.2	5.1	1.8	11.9	18.8	100
b. Only sex offenses	68.6	18.4	4.3	8.7	31.4	100
c. Sex and other offenses	55.0	17.2	7.8	20.0	45.0	100
d. Only other offenses	59.3	5.4	4.3	31.0	40.7	100
b+c+d total	61.4	12.1	5.1	21.4	38.6	100
a+b+c+d total	75.5	7.1	2.7	14.7	24.5	100

SOURCE: Unpublished research of Karl O. Christiansen, Louis le Maire, and Georg K. Stürup.

tions of a deviated personality or libido. Relations with children, for example, especially when indulged in a drunken state, are quite likely to be the result of sudden changes in sexual reactivity, with an increased susceptibility to stimuli usually without sexual value, and not necessarily indicative of permanent abnormalities.

In short, therefore, it can cogently be maintained that the great majority of sex offenders encountered, whether in prisons or in detention institutions, display a very great need for psychiatric treatment. Many of them consciously feel a need for help in coping with something that overwhelms them, almost against their will. With others, the principal psychiatric task is to bring about a recognition of this need. In a closed institution, this often can be done by persuading inmates that they them-

selves and society have common interest in their successful treatment. "Society has an interest" is often grasped by sex offenders, who admit that "after all, society cannot put up with that kind of thing." The ethical insight of these inmates is usually extremely clear; and when their protective shell is penetrated, one finds them full of self-reproach, which has hindered the establishment of rapport.

Even if special psychiatric treatment should not effect a statistically smaller rate of relapse—although it most probably would—such treatment has an independent humanitarian value. The treatment need not in most cases be very complicated. Much can be accomplished by sympathetic listening to the patient and by sober and rational discussions of his sexual and ordinary personality problems, if the atmosphere in which the therapy is conducted is kept objective. During the therapy, a distinction must be drawn between what in all cases must be called regrettable or quite unacceptable acts and the men who commit them; and the latter must not be condemned. When the patient establishes emotional contact with the therapist—professional or nonprofessional—it is important that he still have an opportunity to discuss the regrettable fact that he, against everybody's interests—including his own—has possibly shown irresistible tendencies to commit unacceptable acts.

In a smaller number of cases, this supportive therapy will reveal special problems that may need more radical treatment. In some of these cases, it will be reasonable, for a shorter or longer period, to supplement psychotherapy with what in common parlance is often called hormonal castration—a procedure that is based on the inhibiting effect of female sex hormones on male sex manifestations.²⁶ This treatment has a few disadvantages, especially an annoying enlargement of the breasts, which transvestites reckon a special advantage. Some endocrinologists have also suggested that long and intense hormone administration may increase the risk of cancer. But on the other hand, if the hormones are injected weekly, it may afford a valuable opportunity for psychotherapeutical contact. It is important, however, to integrate the special and/or biological therapy into a total of medical, psychological, and social support program. Hormonal treatment is not enough; libido will quickly revive when hormones are discontinued, and a relapse sometimes follows.²⁷

In several cases, hormonal treatment has succeeded in so calming the patient that simple clarification of a neurotic disturbance has been achieved. For example, a twenty-five-year-old thief, characterized by strong fetichistic and masochistic elements, was considered by a psychiatrist who had had long experience with psychoanalysis to be inaccessible to therapy. He was committed to an institution, where he was subjected to two years of combined hormone and psychotherapeutic treatment. Now, after three years of freedom, he has had no relapses, is earning a living for himself, his wife, and children, and seems to have been liberated of his fetich.²⁸

²⁶ Golla & Hodge, *Hormone Treatment of the Sexual Offender*, 1 LANCET 1006 (1949); Hodges, in *RAPPORT DE BIOTYPOLOGIE* 306 (n.d.).

²⁷ H. R. TEIRICK, *DER PSYCHOLOGE* 320 (1959).

²⁸ Stürup, *Teamwork in the Treatment of Psychopathic Criminals with Special Reference to Horsted-vester*, II *BULLETIN SOCIÉTÉ INTERNATIONALE DE CRIMINOLOGIE* 299, 340-52 (1959).

With great caution in different places—England, Germany, Holland, and the Scandinavian countries, and possibly also in other countries—elaboration of these methods is being assayed, with a view towards employing certain hormone preparations in the same way that antabus is used in the treatment of alcoholics. This has raised the possibility of its employment in ordinary out-patient treatment, but it has not yet been tried in Scandinavia for the large number of cases for which it would be suitable. Less deep-going psychotherapy is being given instead in some cases of suspended sentences or in connection with the short prison sentences that are most frequently imposed.

Even hormonal treatment would not be satisfactory, however, for dealing with either more serious and inveterately morbid cases, or habitually deviating behavior that has become ingrained over many years. Here, time-consuming, analytically-oriented treatment is rather indicated. But there are very few doctors sufficiently well qualified in this field who could undertake such treatment, and they are already heavily committed. Furthermore, the treatment should proceed on an out-patient basis, with the patient living as normal a life as possible under the circumstances. There are also other practical obstacles, in that some of these patients are not amenable to such treatment owing to age, defective intelligence, and peculiarities of personality. Financial problems also may figure largely. Moreover, treatment sessions have to be frequent, and to combine them with normal employment often involves great difficulties. What the patient loses financially during the period he is undergoing treatment in itself often makes it impossible for him to continue the treatment. There is the question, too, of whether the patient lives in a city where he can find a suitable psychotherapist.

A much-disputed alternative remains—namely, the possibility of operative treatment of some of the fortunately very few cases that in most countries are considered hopeless because of the frequency or seriousness of the relapses. Many such offenders are imprisoned for long periods of time, and in some countries punished with death.

In Denmark, a law was passed in 1929 making it possible for a sex offender to consent to castration.²⁹ He himself must apply for it on grounds that his sexual urge causes him to commit crimes rendering him dangerous to society or entailing considerable psychic or social suffering. A detailed medical certificate of approval must also be supplied by an experienced psychiatrist, and the individual must be fully informed of the consequences. Further, if he is married, his wife must give her consent as well, if possible. Norway, Finland, Iceland, and Sweden have enacted legislation similar in principle to the Danish.³⁰

²⁹ Law No. 130 of June 1, 1929, § 1, as amended, Law No. 176 of May 11, 1935, § 2.

³⁰ In 1933, a castration law was enacted in Germany, based on Nazi principles, under which one could be sentenced to castration; later voluntary consent to this procedure was made possible. See A. LANGELOUDEKE, *GERICHTLICHE PSYCHIATRIE* [FORENSIC PSYCHIATRY] 104 (1959). In Holland and Switzerland, castration has also been used therapeutically to a considerable extent, but without special authorizing legislation. See A. WEJFFELS, *HET CASTRATIEVRAAGSTUK* [THE CASTRATION QUESTION] (1954); C. WOLF, *DIE KASTRATION* [CASTRATION] (1934).

Under Danish, Finnish, and Icelandic laws, compulsory castration is possible. This provision has been a dead letter in Denmark, however, and it may soon be repealed. In Finland, on the other hand, most castrations have been compulsory and only a few have been voluntarily sought. This has resulted in a strong public reaction against the procedure and its consequent infrequent employment in the last few years. In Norway, castration has also been used in cases where the basis has been quite doubtful—e.g., to pacify restless mental defectives and insane persons. Nevertheless, authorities agree that the outlook is good for the patient and society when the operation is voluntary, medically well-indicated, and regarded by the patient as treatment.³¹

In Denmark, continuous contact has been kept through the years with every person who has been legally castrated.³² Therefore, it has been possible to record and assess the information given by these patients. In periods when things are going well, their reports concerning the results of the operation seem more optimistic. In other periods, however, when life seems difficult, the opposite is more likely. This illustrates the caution that must be exercised in evaluating apparently well-considered reports from the patient. The predominant reaction following castration, however, is gratitude for the help received; very few have, for any extended period, regretted the operation. There is, therefore, reason to believe that some of those who have been reported as being dissatisfied with the operation were experiencing a merely temporary reaction that would have been dissipated had they been interrogated at a later time.

Not infrequently there is a tendency among the castrated to boast of continuing sexual prowess. It is known, of course, that potency can linger for some years after castration; but the dominating libido invariably will have lost so much of its power that even weak personalities will not be stimulated to spontaneous activity.

The most difficult sex offender cases in Denmark have been treated in Herstedvester, an institution operating under the aegis of the Ministry of Justice that receives psychically abnormal offenders who are neither mentally defective nor insane, but who are suffering from a nontemporary weakness or derangement of their mental faculties.³³ These are, as a rule, chronic offenders. From 1933 to 1951,

³¹ See JOHAN BREMER, *ASEXUALIZATION* (1958); WOLF, *op. cit. supra* note 30; KNUD SAND, *DIE GESETZLICHE KASTRATION* [LEGAL CASTRATION] (1940); *Das dänische Sterilisationsgesetz vom 1 Juni 1929 und seine Resultate* [The Danish Sterilization Law of June 1, 1929 and Its Results], 25 *MONATSSCHRIFT FÜR KRIMINAL-PSYCHOLOGIE* 49 (1935); *La Sterilisation et la Castration legale au Danemark* [Legal Sterilization and Castration in Denmark], 1937 *ANN. DE MÉD. LEG.* —; Stürup, *Sexual Offenders and Their Treatment in Denmark and Other Scandinavian Countries*, *Int'l Rev. Crim. Pol.*, no. 4, 1953, p. 1; Letter from A. Fischer-van Rossen to Georg K. Stürup, Feb. 12, 1959.

³² Detailed reports on the results of legal castration in Denmark were published 5 and 10 years after the passage of the enabling law. KNUD SAND, *DIE GESETZLICHE KASTRATION* [LEGAL CASTRATION] (1940); *Das dänische Sterilisationsgesetz vom 1 Juni 1929 und seine Resultate* [The Danish Sterilization Law of June 1, 1929 and Its Results], 25 *MONATSSCHRIFT FÜR KRIMINALPSYCHOLOGIE* 49 (1935); *La Sterilisation et la Castration legale au Danemark* [Legal Sterilization and Castration in Denmark], 1937 *ANN. DE MÉD. LEG.* —. There will presumably be a continuation of these studies now that 25 years have passed.

³³ See GEORG K. STÜRUP, *FORVARINGSANSTALTEM I HERSTEDVESTER, 1935-51* [THE INSTITUTION AT HERSTEDVESTER, 1935-51] (1959).

Herstedvester received a total of 704 offenders who had been sentenced to an indeterminate detention. Of these, 243 had been sentenced for a sex offense—and in some cases, for another crime as well. Of this group, 223 were paroled before 1956; five still remained in detention; twelve had been transferred to mental hospitals; and three had died during their detention.

The following tabulation indicates the duration of imprisonment of sex offenders at Herstedvester:

	<i>Castrated</i>	<i>Not Castrated</i>
Zero to twenty-three months	127 (86%)	7 (9%)
Twenty-four to forty-seven months	9 (6%)	23 (28%)
Forty-eight months or more	11 (7%)	51 (63%)
Total	147 (99%)	81 (100%)

Of the 147 castrated offenders, five (3.5 per cent) have suffered relapses and committed new sex offenses, and thirteen (9.2 per cent) have committed other crimes—in all, 12.7 per cent have recidivated. Of the eighty-one noncastrated offenders, twenty-four (29.6 per cent) have suffered relapses and committed new sex offenses, and seventeen (21 per cent) have committed other crimes—in all, 50.6 per cent have recidivated. When one considers the nature of this material, a fifty-one per cent rate of relapse is not overly disappointing, but it is not as encouraging as the results obtained where the usual social psychiatric treatment was combined with castration.

In Avereest, an institution in Holland similar to Herstedvester, the results have been similar.³⁴ In the years 1938-56, of the 237 persons who submitted to castration, twenty-two did not turn out successfully: three committed new sex offenses, two were suspected of new sex offenses, and the others were guilty of other antisocial behavior.

In Norway, of 102 castrated sex offenders, only three have suffered relapses and committed new sex offenses. One authority estimates that about twenty-five of this group would have relapsed had they not been castrated; he points out also, however, that it is doubtful whether the operation was necessary in thirty of the cases, and that sixteen cases were not paroled despite the operation. He notes that in the follow-up investigation, twenty-three cases—including the nonparoled sixteen—were found bitter and felt they had been cheated.³⁵

An assessment of the value of castration cannot be attempted here. It poses a difficult clinical task, and only a thorough analysis of the peculiar conditions in each country, including detailed case histories of the patients, can produce an objective answer. It is quite clear, however, that castration will never be numerically a very significant technique for dealing with sex offenses. On the other hand, in the few cases where this procedure has thus far been employed, it has, in combination with careful social-psychiatric treatment, helped many whose sex problems were so severe

³⁴ Letter from A. Fischer-van Rossen to Georg K. Stürup, Feb. 12, 1959. *Treatment of Sex Offenders*], 1952 BEITRÄGE ZUR SEXUALFORSCHUNG 24.

³⁵ BREMER, *op. cit. supra* note 31, at 315-21.

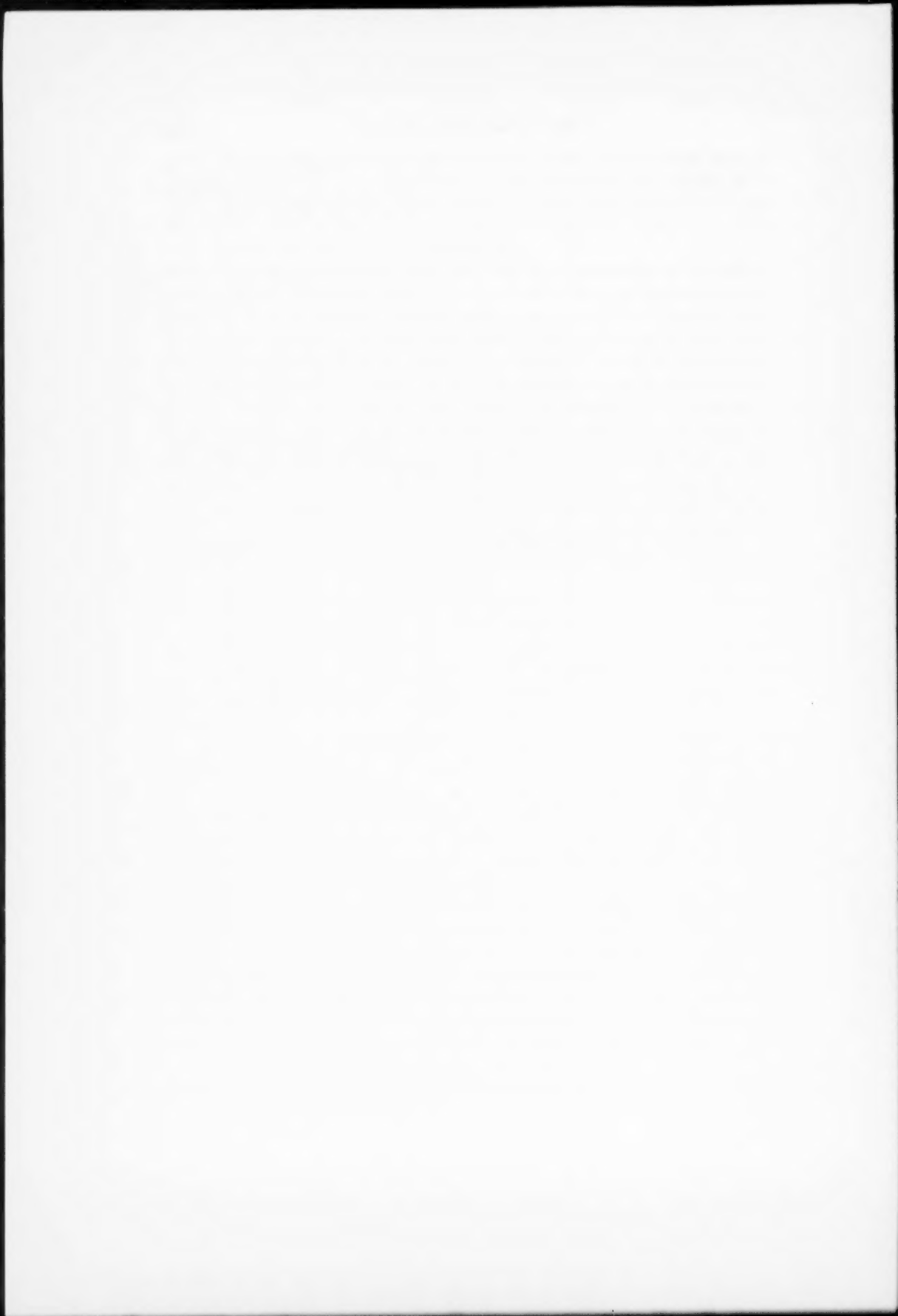
that they could not have been helped in any other way. Prolonged segregation is another rather heroic alternative that has been recommended by some psychotherapists;⁸⁶ but it works a more severe interference in the normal life of a man.

CONCLUSION

For the largest number of sex offenders, social-psychiatric assistance is distinctly needed, although not all sex offenders are necessarily abnormal.⁸⁷ On the contrary, there are many similarities between normal behavior and much of what our culture looks upon as punishable. The differences are more those of degree than of kind. Accordingly, it should be possible to counteract hysterical public reactions, often stimulated by dramatic press descriptions of sex offenses, by objective analysis of sex criminality, its background, its treatment, and the results that may be achieved. Some sex offenses become especially dangerous because the offender himself is caught up in the same panic that later influences those who read about the crime. Unfortunately, this attitude often spreads to the large number of less dangerous sex offenders who are practically harmless and only rarely relapse.

⁸⁶ LOUIS S. LONDON & FRANK S. CAPRIO, *SEXUAL DEVIATION* 606 (1950).

⁸⁷ But see BAAD, *Zur Frage der Behandlung von Sittlichkeitsdelinquenten* [On the Question of the Treatment of Sex Offenders], 1952 *BEITRÄGE ZUR SEXUALFORSCHUNG* 24.



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